91-1212

(1)

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PORTER H. MITCHELL,

Petitioner,

v.

MOBIL OIL CORPORATION, et al.,
a New York Corporation,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THOMAS L. ROBERTS
(COUNSEL OF RECORD)
RODNEY R. PATULA
PRYOR, CARNEY & JOHNSON
A Professional Corporation
6200 S. Syracuse Way, #400
Englewood, CO 80111
Telephone (303) 771-6200
Facsimile (303) 779-0740
Attorneys for Petitioner

January 27, 1992

QUESTION PRESENTED

When a verdict loser elects not to file a Fed.R.Civ.P. 50(b) motion for judgment n.o.v. and the verdict is set aside by the court of appeals due to a gap in the evidence, are the appellate and trial courts without power to order the appellant any relief other than a retrial and is this so notwithstanding the law of the case doctrine?

LIST OF PARTIES

Petitioner (Plaintiff-Appellant):

Porter H. Mitchell

Respondents (Defendants-Appellees):

Mobil Oil Corporation, a New York corporation

Retirement Plan of Mobil Oil Corporation

Trustees of the Retirement Plan of Mobil Oil Corporation

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COMES NOW your Petitioner, Porter H. Mitchell, and hereby respectfully prays this Honorable Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this matter on September 18, 1991.

OPINION BELOW

The unreported opinion of the court of appeals appears in the Appendix at **A-1** through **A-4**. The district court's unreported findings construing the Tenth Circuit's mandate as requiring dismissal of petitioner's ADEA claims appear at **A-15** to **A-18** and the judgment thereon at **A-19** to **A-20**.

JURISDICTION

The judgment of the court of appeals was entered on September 18, 1991, and a petition for rehearing en banc was denied on October 29, 1991. **A-5** to **A-6**. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CIVIL RULE AND STATUTE INVOLVED

A. **Fed.R.Civ.P. 50 (1987).**[1] *See* Appendix H.

B. **28 U.S.C. § 2106.** *See* Appendix H.

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[1] The version of Rule 50 here at issue is the one which became effective on August 1, 1987. It must be noted, however, that no amendment to the rule since *Cone v. West Va. Pulp & Paper Co.*, 330 U.S. 212 (1947) was announced, including the most recent 1991 changes, has in any way affected the scope of appellate court review. The issue presented in this petition persists with the same importance it had when *Cone* was decided.

STATEMENT OF THE CASE

A. Nature of the Case.[2] In March 1986, Mitchell filed suit in the district of Colorado against Mobil Oil Corporation, his former employer of 31 years. He claimed that Mobil willfully violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 ["ADEA"], and the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 ["ERISA"], by manipulating the terms of its retirement plan to induce his constructive discharge by involuntary early retirement. The district court had jurisdiction under 28 U.S.C. § 1331.

In December 1988, Mitchell tried his ADEA claims to a seven-person jury and his ERISA claims to the court. After a five-day trial, the jury unanimously found that Mobil had willfully violated the ADEA and awarded back pay, front pay, and an early retirement penalty. Based on the jury's finding of willfulness, the court doubled the back pay award as liquidated damages. Sitting as a fact finder, the trial court concluded that Mobil had also violated ERISA and awarded monetary relief in the amount of damages awarded by the jury.

Although Mobil had moved for a directed verdict during trial, it chose not to file a post-verdict motion for judgment n.o.v. and lodged an immediate notice of appeal in January 1989 as to both the ADEA and ERISA judgments.

In a February 16, 1990 opinion, the court of appeals reversed the ERISA judgment on a point of law, holding that separated employees (even those whose termination is involuntary) have no standing to prosecute ERISA violations. *Mitchell*, 896 F.2d at 474. As to the ADEA judgment, Mitchell prevailed on each and every specification of legal error

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[2] For a more detailed recitation of the case, see the prior related appeal. *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463 (10th Cir.), *cert. denied*, 111 S. Ct. 252 (1990).

stated by Mobil. 896 F.2d at 467-71. Yet the court of appeals still reversed, finding that Mitchell had not met his burden of production on the issue of pretext. The reversal rested solely on a perceived gap in the supporting evidence, not on any error of law. 896 F.2d at 471-73.

Although the opinion simply reversed, Mitchell's counsel at first mistakenly assumed that it called for dismissal of all claims. In a request for additional time to file a petition for rehearing, Mitchell's counsel stated that the opinion called for "total dismissal of plaintiff's claims, not merely remand for retrial . . . " In fact, however, the opinion was silent as to what remedy Mobil was entitled on remand and merely stated, "we REVERSE the judgments of the district court." 896 F.2d at 474. Nor did the court's judgment offer any guidance; it merely remanded "for further proceedings in accordance with the opinion of this Court." **A-8**.

After denial of rehearing, Mitchell moved to clarify, or alternatively, to amend the judgment to expressly order a new trial. **A-9** to **A-13**. Mitchell pointed out that Mobil's failure to file a motion j.n.o.v. precluded the court from ordering Mobil any relief as to the ADEA claims other than a retrial. Mitchell then requested from this Court an extension of time to file his petition for writ of certiorari, advising that if the Tenth Circuit determined that the ADEA claims were not subject to retrial, despite Mobil's failure to file a motion for judgment n.o.v., then he intended to present an issue to this Court relating to such determination. The result of Mitchell's motion, however, shed no light on the issue, dispatched as it was in one word: "denied." **A-14**.

Having refused to clarify or amend, the court of appeals made no determination as to whether Mitchell was entitled to a new trial on remand. Because Mitchell's entitlement to a new trial had not been denied, the issue never became ripe for

presentation in this Court in the prior proceeding, a fact brought to this Court's attention.[3]

B. Trial Court Disposition After Remand. The mandate which issued following this Court's October 1990 denial of certiorari merely incorporated the opinion and judgment and thus still did not specify what relief Mobil was to receive on remand. Mitchell then moved the trial court to implement the mandate in accordance with long-standing precedent of this Court by ordering a retrial of the ADEA claims. While finding that it would "definitely permit a new trial" if the Tenth Circuit's mandate would allow (**A-16**), the trial judge felt she did not have that option. **A-16**. Reading *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, *reh'g denied*, 386 U.S. 1027 (1967), as modifying the absolute prohibition of *Cone*, as reiterated in *Johnson v. New York, N.H. & Htfd. Rd. Co.*, 344 U.S. 48 (1952), the trial court (although "troubled" by *Johnson*), felt constrained to dismiss the case, **A-16** to **A-18**, and entered judgment accordingly. **A-19** to **A-20**.

C. Mitchell's 1991 Appeal. A second court of appeals panel concluded that the trial court had correctly construed the first panel's mandate as demanding dismissal of the ADEA claims. The decision of the first panel that the trial court should have granted Mobil's motion for a directed verdict became, in the opinion of the second panel, the "law of the case" when the mandate issued. Therefore, Mobil's failure to file a motion for j.n.o.v. was merely "superfluous." **A-3**. The court went on to say (incorrectly) that Mitchell raised the

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[3] As stated in footnote 1 in Mitchell's 1990 Petition: "Petitioner requested an extension in hope that the court of appeals would decide whether Mitchell was entitled to a new trial on remand. The court refused to rule on the question, leaving it for trial court resolution." In his Reply Brief [at 2], Petitioner reiterated this position: "In denying the Motion for Clarification without explanation, the Tenth Circuit did not refuse to order a new trial but simply refused to specify the contents of its mandate in advance. The issue is thus not ripe for consideration by this Court."

issue now being asserted in his petition for rehearing, and denial of that request also became the law of the case. **A-3.**

The court then relied on 28 U.S.C. § 2106 as authorizing direction of the entry of an "appropriate judgment." While the court recognized the holding in *Cone* that "a court of appeals should not direct judgment for a verdict loser who had not moved for judgment notwithstanding the verdict," it cited *Neely* as "contrary authority." **A-3.** The court then stated, however, that it need not decide the jurisdictional issue posed by *Cone* and *Neely* because "the decision in the first appeal became the law of the case" which the second panel was "not entitled to change." **A-3.** The court rejected Mitchell's arguments that the mandate allowed a new trial and that the court of appeals was without power to deny him one as "without merit." **A-4.**

REASONS COMPELLING REVIEW

This case presents a straightforward and pure question of federal law concerning the power of appellate courts to fashion relief for a successful appellant who chose not to comply with post-verdict procedural requirements after loss of a jury trial. A long and unbroken line of authority of this Court beginning with *Cone* in 1947 and continuing through *Neely* in 1967 categorically holds that a verdict loser who does not comply with the procedural requirements of Rule 50(b) by filing a motion for judgment n.o.v. has no right to relief other than a retrial if the judgment is reversed due to the appellate court's finding of a gap in the evidence offered in support of the verdict. This rule is mandatory, jurisdictional, and absolute, and as such, it may not be waived, nor may it be avoided by application of the law of the case doctrine.

Although the panel below couches its decision in "law of the case" terms and denies any decision in this case on the issue of whether *Neely* abrogated *Cone's* strict limitation of the power of appellate courts, the court of appeals did,

indeed, decide this precise issue when it approved the trial court's entry of judgment in favor of Mobil (which filed no motion for judgment n.o.v.) in clear disregard of the Cone rule.

The issue presented is purely legal: whether Mobil waived and irretrievably lost the right to any relief on reversal for insufficiency of evidence other than a retrial when it elected not to file a motion for judgment n.o.v. The sufficiency of the record in the first trial is not at issue here. Nor is this case about whether Mitchell waived any rights—he was and remains entitled to a retrial due to Mobil's failure to preserve its position. Once Mobil limited the scope of its available relief by its chosen strategy, nothing Mitchell did or did not do could cause Mobil's foregone rights to spring back into existence.

This case presents the Court with a unique opportunity to clarify and stabilize the principle established by the *Cone/Globe/Johnson* trilogy of decisions and reaffirmed in *Neely*. The question is one of jurisdiction and power governed by clear decisions of this Court and not one, as Mobil will doubtlessly argue, subject to waiver, nor one, as the Tenth Circuit has held, involving an issue subject to the "law of the case" doctrine.

The need to clarify is compelling. On the one hand, if the Tenth Circuit is incorrect, its opinion conflicts with plain and unequivocal holdings of this Court and creates confusion and lack of uniformity of decision among the circuits as to this important procedural issue. On the other hand, if the Tenth Circuit's reading of *Neely* as allowing entry of judgment without the requirement of a motion for judgment n.o.v. is correct, then virtually every circuit in the federal system is functioning under self-imposed unnecessary restraints on their power. If *Neely* stripped the *Cone* rule of its mandatory and jurisdictional nature, that expansion of appellate power to fashion relief has been lost on virtually every circuit in the federal system because no intermediate court (until this case)

has interpreted *Neely* as undercutting the strictures of *Cone*. *See* fn. 4, *infra*.

This matter deserves the attention of this Court's scarce resources to insure observance of this Court's decisions, clarify the scope of federal appellate power, preserve the uniformity of decisions among the circuits, and examine an unfair departure from the accepted and usual course of judicial proceedings by the court below capable of repetition in other cases.

I. CONE UNMISTAKABLY PRESCRIBES THAT WHEN A VERDICT LOSER ELECTS NOT TO FILE A MOTION FOR J.N.O.V. AND WINS REVERSAL ON APPEAL DUE TO A GAP IN THE EVIDENCE, THE APPELLATE AND TRIAL COURTS ARE WITHOUT POWER TO ORDER ANY REMEDY OTHER THAN A RETRIAL.

This petition presents a pure question of law for this Court's consideration. Mobil never filed a motion for judgment n.o.v. after judgment entered on Mitchell's ADEA verdict. The Tenth Circuit has allowed judgment to enter in favor of Mobil despite this failure. This proceeding requires no other factual predicate.

An unbroken line of authority from this Court, commencing with *Cone*, unequivocally provides that appellate and trial courts are precluded from directing entry of judgment in favor of a verdict loser who did not file a Rule 50(b) motion for j.n.o.v.; only a retrial may be granted. *Cone*, 330 U.S. at 852.

Cone reversed a Fourth Circuit ruling which directed a verdict in favor of a verdict loser who did not move for judgment n.o.v. The certiorari petition challenged the power of the appellate court to direct entry of what was, in effect, a judgment n.o.v. when the verdict loser made no such request in the trial court. After observing that the judge who "saw and

heard the witnesses" and had "the feel of the case which no appellate printed transcript can impart" should be given a final chance to correct its errors (including a refusal to direct a verdict), 330 U.S. at 216, this Court in *Cone* held:

> In the absence of such a motion [for judgment n.o.v.], we think the appellate court was without power to direct the District Court to enter judgment contrary to the one it had permitted to stand.

Cone, 330 U.S. at 218 (emphasis added).

One year later, this Court again held that upon reversal the circuit court was without power to enter judgment for a verdict loser who did not make a j.n.o.v. motion. It could only order a new trial:

> In the *Cone* case we held that the Circuit Court of Appeals was without power to order the entry of final judgment for the loser of a jury verdict in the District Court where he had failed to follow his motion for directed verdict with a timely motion for judgment as required by Rule 50(b).

Globe Liquor Co. v. San Roman, 332 U.S. 571, 572-73, *reh'g denied*, 333 U.S. 830 (1948) (emphasis added). When no motion for judgment n.o.v. is filed, "[t]he case should go back to the District Court for a new trial." *Globe*, 332 U.S. at 574.

Five years later, *Johnson* held that Rule 50(b) motions are not "idle" motions and reiterated the holdings of *Cone* and *Globe*:

> We have said that in the absence of a motion for judgment notwithstanding the verdict made in the trial court within ten days after reception of a verdict the rule forbids the trial judge or an appellate court to enter such a judgment.

Johnson, 344 U.S. at 50 (emphasis added). Citing its prior refusal to adopt a requested "amendment to the rule which would have given appellate courts power to enter judgment

for parties who had made no timely motion for judgment notwithstanding the verdict," this Court stated:

> We did not adopt the amendment then. No sufficiently persuasive reasons are presented why we should do so now under the guise of interpretation.

Johnson, 344 U.S. at 53-54 (citation omitted). When a party fails to file a Rule 50(b) motion for judgment n.o.v. after a verdict, the "respondent is entitled only to a new trial, not to a judgment in its favor." *Id.* (emphasis added).

The *Cone/Globe/Johnson* triology unmistakably provides that a court of appeals which reverses due to an evidentiary deficiency is without power to direct entry of judgment for a verdict loser who filed no j.n.o.v. motion.

As stated by Professor Moore, the "failure to move for judgment n.o.v. can have dire consequences in terms of the scope of review available on appeal." 5A James W. Moore & Jo Desha Lucas, *Moore's Federal Practice*, ¶50.12 at 50-90 (2d ed. 1991). "[I]n this situation the appellate court may not direct the entry of judgment n.o.v. for the appellant; the only relief the appellant may obtain is an order for a new trial." *Id.* at 50-91 (emphasis added).

II. NEELY DID NOT ALTER BUT REAFFIRMED THE RULE OF CONE.

Neely did not constrict or change in any manner the rule established by the *Cone/Globe/Johnson* triology. Rather, *Neely* reaffirmed this line of cases, stating that the three cases "make it clear that an appellate court may not order judgment n.o.v. where the verdict loser has failed strictly to comply with the procedural requirements of Rule 50(b) . . . " *Neely*, 386 U.S. at 325. *Neely* does not, as the court of appeals stated here, extend authority to an appellate court to enter judgment on behalf of an appellant who failed to make a Rule 50(b) motion in the trial court. *Neely* deals only with an appellate court's power where a j.n.o.v. motion has been timely filed—a critical distinction from both *Cone* and from

petitioner's case here. Nowhere does *Neely* confer any power to depart from the *Cone* rule as stated in the Tenth Circuit opinion (a result it not only alludes to but which it undeniably reached through its treatment of its first opinion).

Since *Neely* was announced some 24 years ago, virtually every circuit (including the Tenth Circuit until the decision below) has uniformly construed *Cone's* restrictions on the power of appellate and trial courts to be unaffected by *Neely*.[4]

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[4] The following single citations from the various circuits simply illustrate their continued adherence to the *Cone* rule even after *Neely* was decided. They are by no means exhaustive. *See, e.g.*, **FIRST CIRCUIT:** *Pinkham v. Burgess*, 933 F.2d 1066, 1070 (1st Cir. 1991) (appellant not entitled to an outright reversal of the judgment because he failed to move for j.n.o.v.); **SECOND CIRCUIT:** *Borger v. Yamaha Int'l Corp.*, 625 F.2d 390, 395 (2d Cir. 1980) (a j.n.o.v. not a "useless formality," and absent such a motion, appellate court is without power to enter judgment contrary to the trial court); **THIRD CIRCUIT:** *Charles Jacquin Et Cie v. Destileria Serralles*, 921 F.2d 467, 475 (3d Cir. 1990) ("Where a party has failed to move for j.n.o.v., we will not review the sufficiency of the evidence . . . "); **FOURTH CIRCUIT:** *Morrash v. Strobel*, 842 F.2d 64, 70 (4th Cir. 1987) (failure to file j.n.o.v. is a "crucial omission" which prevents appellate court from entering a judgment contrary to the judgment below and constrains the court to remand the cause for a new trial); **FIFTH CIRCUIT:** *University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 548 (5th Cir. 1974) ("a court of appeals cannot order entry of judgment for a party whose motion for a directed verdict was erroneously denied unless the sufficiency of the evidence is first tested by a motion for judgment n.o.v."); **SIXTH CIRCUIT:** *Howard v. Kerr Glass Mfg. Co.*, 699 F.2d 330, 332 (6th Cir. 1983) (appellate court "precluded" from ordering district court to enter a directed verdict); **SEVENTH CIRCUIT:** *Continental Cas. Co. v. Howard*, 775 F.2d 876, 883 fn.2 (7th Cir. 1985), *cert. denied*, 475 U.S. 1122 (1986) (appellate court would have directed a verdict in favor of party had party filed a timely j.n.o.v. as prescribed by Rule 50(b)); **EIGHTH CIRCUIT:** *Total Petroleum, Inc. v. Davis*, 788 F.2d 476, 479 (8th Cir. 1986) (only relief to be obtained is the ordering of a new trial); **TENTH CIRCUIT:** *Fortier v. Dona Anna Plaza Partners*, 747 F.2d 1324, 1334 (10th Cir. 1984) (citing both *Globe* and *Neely* to support rule that a new trial is the only relief available where no j.n.o.v. motion filed); **ELEVENTH CIRCUIT:** *Norton v.*

(footnote continues)

In fact, research has revealed not a single case in which a verdict loser who made no post-verdict motion for j.n.o.v. was granted any remedy other than retrial after his appeal resulted in reversal due to evidentiary insufficiency.

Commentators agree that *Neely* did not relax the strict rule of *Cone*. The two cases derive from substantively separate origins: *Neely* involved a motion for judgment n.o.v. while *Cone* did not. Professor Moore, for example, treats *Cone/Globe/Johnson* and *Neely* as entirely separate concepts, never discussing them in the same section of his treatise. *See*, 5A *Moore's Federal Practice*, ¶ 50.12 at 50-86, "Power of Appellate Court Where Appellant Failed to Move for Judgment N.O.V. Under Rule 50(b)" (discussing *Cone*, exclusively), and *compare*, ¶ 50.15 at 50-108, "Appellate Review and Disposition of Cases Involving Motions Under Rule 50(b) Where Judgment N.O.V. Is Denied by Trial Court" (discussing *Neely*, exclusively).

III. THE CONE RULE IS MANDATORY AND JURISDICTIONAL, NOT SUBJECT TO WAIVER, AND MAY BE RAISED AT ANY STAGE OF THE PROCEEDINGS.

Given the jurisdictional nature of the bar to the relief sought by Mobil, a waiver by Mitchell was and is a legal impossibility. Mitchell did not waive and could not have waived his right to challenge the appellate court's jurisdiction to direct the entry of a judgment of dismissal, nor his right to

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(footnote continued)

Snapper Power Equip. Div. of Fuqua, 806 F.2d 1545, 1547 (11th Cir.) *reh'g denied*, 812 F.2d 1415 (1987) (appellate court without power to enter j.n.o.v. absent timely motion by losing party after trial); *D.C. CIRCUIT: Harbor Ins. Co. v. Schnabel Foundation Co., Inc.*, 946 F.2d 930, 936 (D.C. Cir. 1991) (where a party has failed to move for j.n.o.v., an appellate court may not reverse and enter judgment; relief is limited to ordering a new trial); *FEDERAL CIRCUIT: Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 854 (Fed. Cir. 1991) (the only available remedy where no j.n.o.v. motion is filed is a remand for a new trial).

convince the trial court to implement the mandate in accordance with controlling precedent of this Court.

Under *Cone* and its progeny, neither the Tenth Circuit nor the district court had the power or jurisdiction to enter any mandate or order which precluded a new trial for Mitchell. As *Cone* held, "the appellate court was without power to direct the District Court to enter judgment." *Cone, 330* U.S. at 218. The rule enunciated in *Cone*, can only be viewed as one of jurisdiction, and jurisdictional issues cannot be waived. *Compare, Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317 (1988) and cases cited therein. Courts "must obey the mandatory provisions of the [federal] rules whether they are referred to as mandatory, jurisdictional or mandatory and jurisdictional." *Mann v. Lynaugh*, 840 F.2d 1194, 1197 (5th Cir. 1988). The rule at issue here implicates the jurisdiction of the court. *Compare, Kain v. Winslow Mfg., Inc.*, 736 F.2d 606, 609 (10th Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985) (where party did not move for new trial, the district court was "powerless to order a new trial, and its order exceeded its authority and jurisdiction").

Mitchell does not maintain that the Federal Rules of Civil Procedure create jurisdiction.[5] The question at issue obviously arises from the jurisdiction granted by statute, 28 U.S.C. § 2106, but that jurisdiction is exercised or expressed by practice in the federal courts which is necessarily governed by the rules of procedure, which in and of themselves are mandatory and jurisdictional. This is the rule enunciated in *Cone* and confirmed unaltered in *Neely*.

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[5] It is axiomatic that no act of a party can confer or withdraw subject matter jurisdiction on a federal court. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). However, the effect of Mobil's failure to move for j.n.o.v. is an entirely distinct jurisdictional issue. Nothing from the law of subject matter jurisdiction relieved Mobil of its procedural requirement under Rule 50(b); nor is the appellate court's scope of power enunciated in *Cone* in conflict with principles of subject matter jurisdiction.

Finally, the true issue in this case is really not one involving the waiver of any rights by Mitchell—to a new trial or otherwise. The issue from which this Court's attention must not be diverted is whether Mobil irretrievably waived or surrendered its right to any remedy other than a retrial when it elected in January 1989 not to file post-trial motions. In effect, the court of appeals has ruled that Mitchell's failure to bring to its attention the issue of limitations on its power to afford relief sooner somehow "waived Mobil's waiver," or in other words, served as the legal equivalent of a Rule 50(b) filing by Mobil in January 1989! Surely, this cannot be the law.

As it has turned out thus far, it has been only Mitchell, not Mobil (nor the court of appeals), who was prejudiced by Mobil's election not to make a Rule 50(b) motion. Mitchell was deprived of the right to move for a new trial or nonsuit because of Mobil's decision not to point out the alleged deficiencies of his evidence at the appropriate procedural time. To hold that Mobil's rights actually increased in scope because it did not follow the rules makes a mockery of the rules of procedure.

IV. NEITHER THE LAW OF THE CASE DOCTRINE NOR ANY OTHER DOCTRINE, RULE OR PRACTICE CAN SERVE TO OBVIATE THE SUPREME COURT PRECEDENTS THAT GOVERN HERE.

In its mechanical application of the law of the case doctrine, the court of appeals holds, in effect, that even if it or the district court erroneously applied Supreme Court precedent, that error no longer can be corrected. Such is not the law.

First, it must be remembered that the court's opinion and judgment merely reversed and remanded and did not prescribe the relief to be afforded Mobil. The "law of the

case" doctrine cannot be applied under these circumstances so as to foreclose a retrial:

> In a case in which the mandate of the appellate court does not address a particular issue, the appellate judgment, on this issue, does not establish the law of the case, and on appeal from the judgment rendered after remand, it may be reviewed by the appellate court.

1B *Moore's Federal Practice*, ¶ 0.404[4.-3] at 131.

Second, the doctrine is not an inflexible restraint on judicial power. "[T]he law-of-the-case doctrine 'merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power.' *Christianson v. Colt Industries*, 486 U.S. 800, 817 (1988) (citations omitted) (emphasis added).

Third, as this Court has itself recognized "[m]ost importantly, law of the case cannot bind this Court in reviewing decisions below." *Id.* Even if the doctrine bound the courts below in this matter (which it did not), it does not constrain this Court at all.

Fourth, the court of appeals has employed the law of the case doctrine as something which gives courts the power or authority to ignore Supreme Court precedent and supplant law which governs jurisdictional issues. As the court held in *Fogel v. Chestnutt*, 668 F.2d 100 (2d Cir. 1981), *cert. denied*, 459 U.S. 828, *reh'g denied*, 459 U.S. 1059 (1982):

> [I]f . . . a decision of the Supreme Court demonstrates that a ruling on which the judgment would depend was in error, no principle of law of the case would warrant a failure on our part to correct the ruling.

Fogel, 668 F.2d at 109 (citations omitted).

Fifth, the law of the case doctrine does not entail the extent of finality which the court below has given it:

> It is important to note that the law of the case doctrine does not limit this court's power to reconsider earlier rulings in the case. The doctrine is a self-imposed prudential limitation rather than a recognition of limitation of the court's power.

Evans v. City of Chicago, 873 F.2d 1007, 1014 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 2560 (1990) (emphasis added) (citations omitted). The Tenth Circuit has previously recognized the same rule in *United States v. Carson*, 793 F.2d 1141, 1147 (10th Cir.), *cert. denied*, 479 U.S. 914 (1986): The "law of the case is not a jurisdictional rule; rather it is a rule to be applied at the sound discretion of the court to effectuate the proper administration of justice. . . ." *See also Southern Ry. Co. v. Clift*, 260 U.S. 316, 319 (1922).

For the foregoing reasons, there can be no law of the case or related preclusion doctrine that prevented the second court of appeals panel in this matter from correcting the errors of the district court in construing the appellate court's mandate or in determining the limits to its own jurisdiction, or the appellate court's own error if the first panel did direct the district court to enter judgment contrary to governing precedent of this Court.

CONCLUSION

For the reasons above stated, this petition should be granted to review the decision below to conform with established precedent of this Court, clarify the scope of the court of appeals' power after *Neely*, avoid decisional confusion among the circuits, determine whether the "law of the case" doctrine can serve to remove limits on an appellate court's powers,

and rectify an egregious departure from the accepted and usual course of judicial proceedings.

Respectfully submitted,
Thomas L. Roberts
(Counsel of Record)
Rodney R. Patula
PRYOR, CARNEY & JOHNSON
A Professional Corporation
6200 South Syracuse Way, No. 400
Englewood, CO 80111
Telephone: (303) 771-6200
Facsimile: (303) 779-0740

Counsel for Petitioner
Porter H. Mitchell

DATED this 27th day of January 1992.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PORTER H. MITCHELL,
Plaintiff-Appellant,

v.

MOBIL OIL CORPORATION, A New York corporation; RETIREMENT PLAN OF MOBIL OIL CORPORATION; TRUSTEES OF THE RETIREMENT PLAN OF MOBIL OIL CORPORATION,
Defendants-Appellees.

No. 91-1084
(D. C. No. 86-Z-585)
(D. Colo.)

ORDER AND JUDGMENT*
[Filed September 18, 1991]

Before ANDERSON, TACHA, and BRORBY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Mr. Mitchell appeals the entry of a judgment based upon the mandate of this court. We affirm.

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

Mr. Mitchell sued Mobil asserting age discrimination. A jury agreed and awarded Mr. Mitchell damages. Mobil appealed to this court and we reversed, holding that Mr. Mitchell's evidence was insufficient. We then remanded "for further proceedings in accordance with the opinion of this court."

Mr. Mitchell requested and received an extension of time to file a petition for rehearing with an en banc suggestion. In his request Mr. Mitchell recognized that this court's decision "calls for total dismissal of plaintiff's claims, not merely remand for new trial." In his petition for rehearing he represented to this court that we had reversed the judgments and ordered dismissal. He also claimed that he could present additional evidence at a retrial. We denied rehearing and granted Mr. Mitchell a stay while he petitioned for certiorari. Mr. Mitchell then filed a motion with this court to clarify its opinion and to declare he should have a new trial on remand. He stated if we deny this relief "Mitchell desires to challenge this ruling" in the petition for certiorari. Certiorari was denied, as was the relief requested from this Court.

Upon remand, Mr. Mitchell asserted he was entitled to a new trial. The basis of this assertion was the fact that Mobil had failed to move for judgment notwithstanding the verdict.[1] As in his petition for rehearing, on remand Mitchell pointed to additional evidence he could offer in a second trial. Mitchell did not claim that the additional evidence was newly discovered. However, Mr. Mitchell argued he could reasonably be expected to discover new evidence.

The district court denied Mr. Mitchell's request for a new trial stating that the circuit court had not given the trial court that option. Mr. Mitchell appeals this decision asserting: (1) the district court misconstrued the mandate of this

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[1] Mobil had moved for a directed verdict at the close of Mr. Mitchell's case. At the close of all evidence, Mobil again moved for a directed verdict.

court; and (2) the district court erred in holding that this court and the district court possessed the power to afford Mobil any remedy other than retrial.

We begin our inquiry with an examination of this court's holding on appeal. There we said:

> Since Mr. Mitchell did not meet his burden of production on the issue of pretext . . . we reverse the trial court's denial of Mobil's motion for a directed verdict . . . .

Mitchell v. Mobil Oil Corp., 896 F.2d 463, 473 (10th Cir.), *cert. denied*, 111 S. Ct. 252 (1990).

This holding became the law of this case when the mandate was issued. The holding was simple—the trial court should have granted Mobil's motion for a directed verdict. Mr. Mitchell's claim regarding Mobil's failure to request judgment notwithstanding the verdict is therefore superfluous. Mr. Mitchell raised the claims he is now asserting in his petition for rehearing. We have denied relief on those claims, the law of the case controls.

28 U.S.C. § 2106 specifically authorizes courts of appeals to "direct the entry of . . . appropriate judgment." This we did in the first appeal. Mr. Mitchell argues that a court of appeals should not direct judgment for a verdict loser who had not moved for judgment notwithstanding the verdict. Authority exists to support this argument. See *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212 (1947). Contrary authority also exists. See *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 325-26 (1967) (holding no ironclad rule exists dictating that the court of appeals should never order judgment for a defendant when the plaintiff's verdict has been set aside on appeal.) However, we need not decide this issue. Our decision in the first appeal became the law of the case. This panel is not entitled to change the decision of this court as enunciated by the first panel.

The judgment of the district court is AFFIRMED. Mr. Mitchell's arguments that the mandate of this court allows him a new trial are without merit, as are his arguments that this court lacked the power to deny him a new trial.

Entered for the Court:

/s/

WADE BRORBY
Circuit Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PORTER H. MITCHELL,
Plaintiff-Appellant,

v.

MOBIL OIL CORPORATION, A New York corporation; RETIREMENT PLAN OF MOBIL OIL CORPORATION; TRUSTEES OF THE RETIREMENT PLAN OF MOBIL OIL CORPORATION,
Defendants-Appellees.

No. 91-1084

ORDER
Filed October 29, 1991

Before McKAY, Chief Judge, HOLLOWAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY and EBEL, Circuit Judges.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be

polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER,
Clerk

/s/

By: _____
Patrick Fisher
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PORTER H. MITCHELL, *Plaintiff-Appellee/ Cross-Appellant,* v. MOBIL OIL CORPORATION, A New York corporation; RETIREMENT PLAN OF MOBIL OIL CORPORATION; TRUSTEES OF THE RETIREMENT PLAN OF MOBIL OIL CORPORATION, *Defendants-Appellees/ Cross-Appellees.*	Nos. 89-1019 89-1031 89-1085 89-1111
ERISA INDUSTRY COMMITTEE and ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS, *Amici Curiae.*	

JUDGMENT
Entered February 16, 1990

Before MOORE and ANDERSON, Circuit Judges, and DAUGHERTY, District Judge.*

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is reversed. The cause is remanded to

the United States District Court for the District of Colorado for further proceedings in accordance with the opinion of this court.

Entered for the Court

ROBERT L. HOECKER,
Clerk

/s/

By: _____
Patrick Fisher
Chief Deputy Clerk

*The Honorable Frederick A. Daugherty, Senior District Court Judge for the Western District of Oklahoma, sitting by designation.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT
Case Nos. 89-1019, 89-1031, 89-1085, and 89-1111

PORTER H. MITCHELL,
Plaintiff-Appellee/
Cross-Appellant,

v.

MOBIL OIL CORPORATION,
Defendants-Appellant/
Cross-Appellee.

MITCHELL'S MOTION FOR CLARIFICATION OF THE FEBRUARY 16, 1990 OPINION AND JUDGMENT, AND ALTERNATIVELY, MOTION TO AMEND JUDGMENT AND MANDATE TO EXPRESSLY ORDER A NEW TRIAL

COMES NOW the plaintiff-appellee Porter H. Mitchell, pursuant to F.R.A.P. 27(a) and governing precedent, and hereby requests this Honorable Court to clarify its opinion and judgment to expressly declare that upon remand, Mitchell is to be afforded a new trial on his ADEA claim, or if such is not the intent of the Court, then in the alternative, based upon the authority discussed below, to modify the opinion, judgment, and future mandate to expressly direct the district court to afford Mitchell such a retrial upon remand, and **AS GROUNDS THEREFORE,** states the following:

1. On December 13, 1988, the jury returned a verdict in favor of Mitchell on his age discrimination claim finding that Mobil's manipulation of its employee

pension plan constituted a willful violation of the ADEA. Following a hearing on January 4, 1989, the Court entered judgment for Mitchell on both his ADEA and ERISA claims.

2. On January 18, 1989, Mobil filed its notice of appeal without filing a F.R.C.P. 50(b) motion for judgment notwithstanding the verdict as to the ADEA verdict. Docket Sheet (excerpts attached).

3. In the February 16, 1990 opinion of this Court, the panel affirmed the trial court's refusal to grant Mobil a directed verdict at the end of plaintiff's case-in-chief on the ADEA claim, but then overruled the trial court's denial of a directed verdict at the close of the evidence, stating simply: "We REVERSE the judgments of the district court." **Mitchell v. Mobil Oil Corp.,** 896 F.2d 463, 474 (10th Cir. 1990).

4. The judgment which entered on February 16, 1990 merely states:

> Upon consideration whereof, it is ordered that judgment of that court is reversed. The cause is remanded to the United States District Court for the District of Colorado for further proceedings in accordance with the opinion of this Court.

Judgment (attached). Neither the opinion nor the judgment specify as to whether the trial court is directed on remand to order a new trial or to enter judgment for Mobil on the ADEA claim.

5. In light of the stay of mandate through July 16, 1990, no specific mandate has yet issued to the district court; therefore, this Court clearly has jurisdiction over the issue raised herein.

6. Due to absence from the opinion or judgment of an express direction as to whether, upon remand, the district court is to enter judgment in favor of Mobil and

dismiss Mitchell's claims, or on the other hand, to order Mitchell a new trial, a clarification by the Court is necessary.

7. Since the issue is one of subject matter jurisdiction, it can be raised at any time, but insofar as the Court may believe otherwise, Mitchell invokes the Court's general supervisory power and powers under F.R.A.P. 1(b), 2 and 26(b) to relieve a party from the time and content restraints of the Rules such as those, for example, imposed by F.R.C.P. 40 to permit, in the interest of substantial justice, grant of the relief requested.

8. Mitchell intends to file a Petition for Certiorari in the United States Supreme Court by July 16, 1990 or by such later date as may be permitted. If this Court denies the relief requested in this motion, then Mitchell desires to challenge that ruling in the Petition for Certiorari. Mitchell, therefore, requests accelerated determination of this motion.

ARGUMENT

Since Mobil never filed a Rule 50(b) motion for judgment n.o.v., this Court, after reversing Mitchell's judgments, has no power to order entry of judgment in favor of Mobil upon remand but can only order that a new trial be had. A trilogy of still controlling United States Supreme Court opinions and Court of Appeals opinions, including decisions from this Circuit, so hold.

* * *

CONCLUSION AND PRAYER

The controlling authority discussed above plainly holds that this Court is without jurisdiction to order entry of judgment in favor of Mobil upon remand on the ADEA claim in

light of Mobil's failure to file a Rule 50(b) motion for judgment n.o.v. with respect to the ADEA verdict. As to that claim, the jurisdictional power of this Court is limited to remand of this cause to the district court with directions to order a new trial.

Due to the lack of specificity in the Court's opinion and judgment entered on February 16, 1990, Mitchell respectfully requests this Court to clarify the intent of those documents by expressly directing that a retrial on the ADEA claim shall be ordered on remand.

Mitchell asks that the above clarification and relief enter as expeditiously as possible to allow adequate time, if necessary, to include in Mitchell's Petition for Certiorari an alternative request for the relief herein sought.

WHEREFORE, plaintiff-appellee Porter H. Mitchell respectfully requests this Honorable Court to clarify its prior opinion and judgment to the effect that remand is with directions to order a new trial on Mitchell's ADEA claim, or in the alternative, if that was not the intention of this Court, to modify and amend the opinion and judgment (and later, fashion the mandate accordingly) to expressly direct the district court to order a retrial of Mitchell's ADEA claim on remand if he is unsuccessful in achieving reinstatement of his judgments via a certiorari proceeding with United States Supreme

Court and to afford Mitchell such other and further relief as the Court deems appropriate under the circumstances.

ATTORNEYS FOR PORTER H. MITCHELL:

/s/

THOMAS L. ROBERTS
RODNEY R. PATULA
PETER H. ZIEMKE
PRYOR, CARNEY AND JOHNSON
A Professional Corporation
6200 S. Syracuse Way, Suite 400
Englewood, CO 80111
(303) 771-6200

Submitted: June 21, 1990

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PORTER H. MITCHELL, *Plaintiff-Appellee, Cross-Appellant,* v. MOBIL OIL CORPORATION, etc., et al., *Defendants-Appellants, Cross-Appellee.*	89-1019 89-1031 89-1085 89-1111

ORDER
Filed July 5, 1990

Before MOORE and ANDERSON, Circuit Judges.

This matter comes on for consideration of plaintiff's motion to clarify.

Upon consideration whereof, the motion is denied.

Entered for the Court

ROBERT L. HOECKER,
Clerk

/s/

By: _____
Patrick Fisher
Chief Deputy Clerk

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 86-Z-585

PORTER H. MITCHELL,

Plaintiff,

vs.

MOBIL OIL CORPORATION, *et al.*,

Defendant.

REPORTER'S TRANSCRIPT
(Hearing on Motion for New Trial)

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[160] Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 9:50 a.m., on the 7th day of February, 1991, in Courtroom C-502, United States Courthouse, Denver, Colorado.

APPEARANCES

PRYOR, CARNEY & JOHNSON, by RODNEY R. PATULA and THOMAS L. ROBERTS, Attorneys at Law, 6200 South Syracuse Way, Suite 400, Englewood, Colorado, 80111, appearing for the plaintiffs.

HADDON, MORGAN & FOREMAN, by HAROLD A. HADDON, Attorney at Law, 150 East Tenth Avenue, Denver, Colorado, 80203; LOREN KIEVE and MARY ANN DOYLE, Attorneys at Law, Debevoise & Plimpton, 875 Third Avenue, New York, New York, 10022, and [161]

MICHAEL E. TIGAR, Attorney at Law, 727 East 26th Street, Austin, Texas, 78705, appearing for the defendants.

Proceedings Recorded by Mechanical Stenography, Transcription Produced via Computer by Paul Zuckerman, 1929 Stout Street, P.O. Box 3563, Denver, Colorado 80294, (303) 629-9285.

* * *

[189]

RULING

THE COURT: This court intends to deny the motion for a new trial. And I am going to explain why I am denying the motion for a new trial. But let me indicate that had the Tenth Circuit in the mandate given this court the option of granting a new trial or dismissing the case, this court would definitely permit a new trial.

The plaintiff has represented that there is additional evidence that was not presented or adequately presented and that they would want to present this evidence. The reason the Court is not granting a new trial is because I am convinced that the Tenth Circuit has not given me that option. The wording of the Tenth Circuit has been read already, but we'll review it again—is that paragraph starting with the beginning of the paragraph. It says, "Since Mr. Mitchell did not meet his burden of production on the issue of pretext, the onerous effects of the changes in the plan notwithstanding, we reverse the trial court's denial of Mobil's motion for a directed verdict. Because we hold that Mobil did not violate the ADEA, we need not review Mr. Mitchell's cross-appeal on issues [190] relating to the measure of damages."

I read that language as, in effect, a reversal telling me to enter a judgment of dismissal. Maybe they didn't say that, but that's the clear inference from the Tenth Circuit's language.

The language in the *Neely* case does indicate that there is no ironclad rule and that the Court of Appeals has the authority to order this court to enter a dismissal. In addition, the Tenth Circuit refused to address the issue when there was a motion for clarification and when the Tenth Circuit was specifically asked that the mandate issue allowing a new trial in the case.

I'm troubled by *Johnson*, because *Johnson's* language would seem to indicate, No. 1, that the Tenth Circuit would not have the authority to allow a new trial in this case because there was no j.n.o.v., but perhaps the strong and harsh ruling of the *Johnson* case has really been modified by *Neely*, which says that there is the power.

Commentators such as Wright and Miller certainly have spoken out against what they feel to be an utterly useless new trial, just by finding—I'm sorry—just by following the strong language of the *Johnson* case.

If Mobil had filed a motion for a judgment n.o.v. in this case, there would not be an issue. I would have denied the motion for judgment n.o.v. There would be no procedural [191] defect, and there would be no new trial. It's difficult to see how the plaintiff is really prejudiced because of the fact that plaintiff—that the Mobil did not move for a j.n.o.v.

My opinion is that the Tenth Circuit is telling me to dismiss the case; and my opinion is that they have the authority to tell me that under both *Neely* and 2106, even though I am very bothered by *Johnson*. But I'm going to let the Tenth Circuit wrestle with *Johnson*.

If my denial of a motion for new trial is procedurally incorrect, this matter is going to be taken up to the Tenth Circuit and they can tell me that it is; and I will be very happy to try the case again with new evidence and additional evidence. But I frankly think that that is just not what was ordered in the mandate, even though the—I wish the Tenth Circuit had been precise and had either said to this trial court,

Try it again, or dismiss it, one or the other. They did not, but the inference from their language is clearly there to me. I infer that they're telling me to dismiss the case.

For the reasons that I have stated, the motion for a new trial will be denied. I'll be very anxious to hear what the Tenth Circuit does on appeal with my denial of it. I've tried to make clear the reasons for my denial and incorporate by reference on the record what this court's opinion is. I do not intend to issue a written opinion, but I would ask the attorneys to have the court reporter do a transcript. I have a [192] whole slew of criminal trials coming up, and I'd just as soon let you just take up what I've said and let the Tenth Circuit agree (sic) with that.

Do we have anything else we need to do in this case? Any loose ends? I think not.

I appreciate the argument. It's a very knotty, very difficult issue. It is not an easy issue, and the argument this morning has certainly helped me to clarify my thoughts. Anything further?

MR. PATULA: Nothing further, your Honor.

MR. KEIVE: Thank you very much, your Honor.

THE COURT: Thank you.

(Thereupon, the hearing was concluded and the Court recessed at 10:45 a.m.)

* * *

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 86-Z-585

PORTER H. MITCHELL,

Plaintiff,

v.

MOBIL OIL CORPORATION, a New York corporation; RETIREMENT PLAN OF MOBIL OIL CORPORATION; TRUSTEES OF THE RETIREMENT PLAN OF MOBIL OIL CORPORATION;

Defendants.

ORDER AND JUDGMENT
[Filed February 28, 1991]

This matter was before the Court on February 7, 1991, for oral argument on Plaintiff's Motion To Implement Mandate by Ordering New Trial On His ADEA Claims. The Court heard the arguments and statements of counsel and made oral conclusions of law which are incorporated herein by reference as if fully set forth. Accordingly, it is

ORDERED that Plaintiff's Motion To Implement Mandate By Ordering New Trial On His ADEA Claims is denied. It is

FURTHER ORDERED that, pursuant to and in accordance with the Opinion and Judgment of February 16, 1990, of the United States Court of Appeals For the Tenth Circuit in *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463 (10th Cir. 1990), judgment is entered in favor of Defendants Mobil Oil Corporation, Retirement Plan of Mobil Oil Corporation, and Trustees of the Retirement Plan of Mobil Corporation and

against Plaintiff Porter H. Mitchell for dismissal, the parties to pay their own costs. It is

DATED at Denver, Colorado, this 28th day of February, 1991.

BY THE COURT:

/s/

ZITA L. WEINSHIENK
United States District Court

APPENDIX H

Rule 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict.

(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) Motion for Judgment Notwithstanding the Verdict. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. A party who has moved for a directed verdict may move to have the verdict and any judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with the party's motion for a directed verdict. Not later than 10 days after entry of judgment, a motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned, the court may direct the entry of judgment as if the requested verdict had been directed, or may order a new trial.

(c) Same: Conditional Rulings on Grant of Motion.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose directed verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) Same: Denial of Motion for Judgment as a Matter of Law. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

(As amended Jan. 21, 1963, Eff. July 1, 1963; Mar. 2, 1987, Eff. Aug. 1, 1987; Apr. 30, 1991, Eff. Dec. 1, 1991.)

28 U.S.C. § 2106. **Determination.**

The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or other of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

FILED
FEB 25 1992
OFFICE OF THE CLERK

No. 91-1212

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PORTER H. MITCHELL,

Petitioner,

v.

MOBIL OIL CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

HAROLD A. HADDON
HADDON, MORGAN & FOREMAN, P.C.
150 East Tenth Avenue
Denver, Colorado 80203
(303) 831-7364

MICHAEL E. TIGAR
(Counsel of Record)
727 East 26th Street
Austin, Texas 78705
(512) 471-6319

LOREN KIEVE
JONATHAN E. RICHMAN
DEBEVOISE & PLIMPTON
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-8000

Counsel for Respondents Mobil Oil Corporation, et al.

February 25, 1992

COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the Tenth Circuit permissibly exercised its discretion in holding that petitioner – who has now filed his second certiorari petition – is barred by the law of the case from seeking to relitigate issues decided against him in his first appeal, because (*i*) he waived whatever right he might have had to a new trial and (*ii*) the decision in the first appeal did not involve any non-waivable "jurisdictional" issues.

LIST OF PARTIES

Respondents Mobil Oil Corporation, *et al.*, adopt the list of parties in petitioner's petition, but note that the Trustees of the Retirement Plan of Mobil Oil Corporation were never served with process.

Mobil Oil Corporation's parent is Mobil Corporation, a publicly held corporation.

A list of Mobil Oil Corporation's non-wholly owned subsidiaries, required by Sup. Ct. R. 29.1, is included in the supplemental appendix to this opposition [SA-30].[1]

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[1] "SA-__" refers to the supplemental appendix following this opposition. "A-__" refers to the appendix to petitioner's petition.

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No. 91-1212

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PORTER H. MITCHELL,

Petitioner,

v.

MOBIL OIL CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION

Porter H. Mitchell petitions for review of an unpublished "Order and Judgment" based on the Tenth Circuit's straightforward application of the law of the case and on Mr. Mitchell's repeated waivers of the claims he now seeks to present.

This is Mr. Mitchell's second certiorari petition. It seeks to raise an issue he deliberately chose not to include in his first one, which was denied. 111 S. Ct. 252 (1990).

The Tenth Circuit was correct on the law and the facts in applying the law of the case. The court expressly held that it "need not decide" – and it did not decide – the issue Mr. Mitchell would present to this Court. [A-3.]

COUNTERSTATEMENT OF THE CASE

The Tenth Circuit's unpublished Order and Judgment ("*Mitchell II*") sets out the relevant procedural history and demonstrates why that court's ruling was correct. *See also Mitchell v. Mobil Oil Corp.*, 896 F.2d 463 (10th Cir.), *cert. denied*, 111 S. Ct. 252 (1990) ("*Mitchell I*") (SA-1) (decision in first appeal).

The Court of Appeals did not address Mitchell's representations to this Court in his first petition for certiorari. We do so briefly.

After he had filed several briefs and papers seeking to overturn or modify *Mitchell I*'s reversal of his jury verdict, Mitchell asked Justice White for an extension of time to file his first certiorari petition. His July 2, 1990 motion stated that he needed more time because he "intend[ed] to present [his new-trial] issue to this Court" if the Tenth Circuit denied his motion. [SA-20.]

That issue is the same one he now seeks to present to this Court.

An extension, Mitchell said, would "avoid the necessity of [his] filing two separate petitions for certiorari at two different times, thereby needlessly consuming the resources of this Court and the parties." [SA-20.]

That same day, Mitchell asked the Tenth Circuit to extend its stay of mandate pending the delayed filing of his certiorari petition. As he put it, his pending motion to clarify or amend the judgment in *Mitchell I*

> . . . presents special and important reasons for issuance of a writ of certiorari and should this Court declare that the district court is ordered to enter judgment for Mobil on the ADEA claim on remand despite Mobil's failure to move for judgment notwithstanding the verdict, Mitchell desires to challenge that ruling as well in his petition for certiorari. [SA-22.]

Justice White granted Mitchell's motion for more time, and the Tenth Circuit extended the stay of mandate.

But Mitchell's first certiorari petition did not raise the issue on which he now seeks review – and on which the Tenth Circuit held he was bound by the law of the case. If the word "waiver" has any meaning, Mr. Mitchell has repeatedly waived this claim.

REASONS FOR DENYING THE WRIT

I

The Tenth Circuit Correctly Held that Mitchell's Knowing and Intentional Failure to Raise the Issue He Now Presents Triggers the Law of the Case and Precludes Further Litigation.

Mr. Mitchell concedes [at 3] that (a) he did not assert his new-trial arguments until after the conclusion of the first appeal (including rehearing) and (b) he did not raise the Tenth Circuit's denial of his motion to clarify in his first certiorari petition.

He therefore failed to preserve for review the sole question he now presents in his second certiorari petition. His waivers also amply justify the Tenth Circuit's application of law of the case in *Mitchell II*. E.g., *Local 28 of the Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 441 (1986) (prior judgments never challenged on certiorari are not open to review in subsequent petition); *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 432 (1976) (validity of original judgment not before Court because it had not been appealed); *Northwestern Ind. Tel. Co. v. FCC*, 872 F.2d 465, 470 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 757 (1990) ("It is elementary that where an argument could have been raised on an initial appeal, it is inappropriate to consider that argument on a second appeal following remand."); *see also Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981), *cert. denied*, 459 U.S. 828 (1982) ("It would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost.").

A. Mitchell Repeatedly Waived His New-Trial Claim.

1. Mitchell's First Waiver

Mobil's opening brief in the first appeal (*Mitchell I*) challenged the sufficiency of the evidence and asked the Tenth Circuit to "reverse and remand with instructions to enter judgment in Mobil's favor." [Mobil's 3/30/89 Br. at 49.]

Mr. Mitchell therefore knew that Mobil was asking for (*i*) a determination that his evidence was insufficient and (*ii*) entry of judgment in Mobil's favor. He also knew that Mobil had not asked the district court to enter judgment notwithstanding the verdict.

But Mitchell did not claim — in his answering brief, in his reply brief as cross-appellant, or at oral argument — that he could provide additional evidence that might warrant a new trial if the judgment were reversed. Nor did he claim that the Tenth Circuit was "without power" or "jurisdiction" to direct the entry of judgment for Mobil.

2. Mitchell's Second Waiver

The Tenth Circuit held in *Mitchell I* that "Mobil did not violate the ADEA," and it "reverse[d] the trial court's denial of Mobil's motion for a directed verdict." [SA-15.] The court also declined to review Mitchell's cross-appeal on damages "[b]ecause we hold that Mobil did not violate the ADEA" [*id.*][2] The clear message was that the case was over.

Mr. Mitchell understood this in no uncertain terms. He repeatedly acknowledged that the Tenth Circuit's decision "calls

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[2] Had the Tenth Circuit contemplated a new trial, it would not have viewed Mitchell's cross-appeal as irrelevant — as the district court noted in denying Mitchell's new-trial motion [A-16]. *E.g.*, *Carter v. Unit Rig & Equip. Co.*, 908 F.2d 1483, 1489 (10th Cir. 1990) ("since this issue may arise again on the retrial of this case, we will discuss the [cross-appeal]"); *id.* at 1486 n.4.

for total dismissal of plaintiff's claims, not merely remand for retrial . . . ." [SA-28 (motion for extension to file rehearing petition); *accord* SA-25 (Tenth Circuit had "reversed [the] judgments and ordered dismissal") (rehearing petition).]

But Mitchell's petition for rehearing did not (*i*) challenge the Tenth Circuit's authority to direct entry of judgment or (*ii*) ask for a retrial — much less offer any reason why a retrial might be appropriate.

3. **Mitchell's Third Waiver**

On June 21, 1990, Mitchell filed a motion asking the Tenth Circuit to clarify or amend the judgment to grant him a new trial. He also requested expedited consideration because, "[i]f [the Tenth Circuit] denies *the relief requested in this motion* [*i.e.*, "clarification" or "amendment"], then Mitchell desires to challenge that ruling in the Petition for Certiorari." [A-11 (emphasis added).] He made essentially the same promises in two other motions to Justice White and the Tenth Circuit. [SA-20; SA-22.]

The Tenth Circuit denied the motion to clarify or amend. Mitchell's first certiorari petition, however, never questioned the Tenth Circuit's judgment or mentioned any of his new-trial arguments — except to misrepresent that the Tenth Circuit had "refused to rule on the question" [*see* 1992 petition at 4 n.3]. The Tenth Circuit *had* ruled. It had denied the motion. *See Mitchell II* ("Mr. Mitchell raised the claims he is now asserting in his petition for rehearing [*i.e.*, his motion to clarify]. We have denied relief on those claims") [A-3].

Mitchell's deliberate failure to raise his new-trial issue in his first certiorari petition — after having promised Justice White and the Tenth Circuit three times that he would do so — constitutes yet another intentional waiver, and makes review through a second certiorari petition wholly inappropriate. *Sheet Metal Workers*, 478 U.S. at 441 ("Petitioners did not seek certiorari from this Court to review either of the Court of Appeals' judgments.

Consequently, we do not have before us any issue as to the correctness of [those earlier rulings].").[3]

B. The Tenth Circuit Properly Applied the Law of the Case.

The Tenth Circuit properly exercised its discretion in applying the law of the case, particularly in view of Mitchell's repeated waivers. The court decided in the first appeal that judgment should enter for Mobil. Mr. Mitchell twice acknowledged that fact, and the judgment became final.

The Tenth Circuit was not required to decide these issues a second time in *Mitchell II*, and was entitled to treat its earlier rulings as the law of the case.

> "[T]he doctrine [of the law of the case] posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." . . . This rule of practice promotes the finality and efficiency of the judicial process by "protecting against the agitation of settled issues."

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 815-16 (1988); *accord Falcon v. General Tel. Co.*, 815 F.2d 317, 319-20 & n.5 (5th Cir. 1987) (failure to honor prior panel's decision provides incentive for losing party to "bring it back a second, or a third, or a fourth time until all the possibilities for reversal [are] exhausted").[4]

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[3] Mitchell's complaint [at 4] that the Tenth Circuit's mandate was not more specific than its opinion and judgment is frivolous. His lawyers knew (and are deemed to have known) that the mandate would consist of the Tenth Circuit's opinion and judgment along with a bill of costs. *See* Fed. R. App. P. 41(a).

[4] *See also Coal Resources v. Gulf & W. Indus., Inc.*, 865 F.2d 761, 766-67 (6th Cir. 1989) (if issue "has previously been decided in this litigation, we need not address it further"); *Gage v. General Motors Corp.*, 796 F.2d 345, 349 (10th Cir. 1986) (law of the case "is a rule based on sound public policy that litigation should come to an end . . . and is designed to bring about a quick resolution of disputes by preventing continued re-argument of issues already decided").

Mitchell's arguments to the contrary [at 13-15] all fail.

First, the assertion [at 13] that *Mitchell I* "merely reversed and remanded and did not prescribe the relief to be afforded Mobil" is flatly untenable:

(a) the Tenth Circuit held that "Mr. Mitchell produced no evidence to support [his] inference" of age discrimination [SA-14];

(b) it "reverse[d] the trial court's denial of Mobil's motion for a directed verdict" [SA-15];

(c) it did not address Mitchell's cross-appeal [*id.*];

(d) Mitchell himself correctly interpreted the court's ruling as a "total dismissal of plaintiff's claims, not merely remand for retrial" [SA-28; *accord* SA-25]; and

(e) the Tenth Circuit's decision in *Mitchell II* confirmed that *Mitchell I* had directed entry of judgment for Mobil.

Second, *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. at 817-18, is inapposite, because the judgment in that case was before this Court for the *first* time — not, as here, for a second time.

Third, *Fogel v. Chestnutt*, 688 F.2d at 109, does not hold — as Mitchell implies [at 14] — that an alleged conflict with a *prior* decision of this Court would justify disregarding the law of the case. Rather, *Fogel* and other authorities speak of departing from the law of the case where an *intervening* decision has reached a contrary and controlling conclusion. 688 F.2d at 109. There is no such decision here.

If Mr. Mitchell thought that any pre-existing authority somehow barred the outcome in *Mitchell I*, he had ample opportunity to challenge the Tenth Circuit's ruling — before it became final and the law of the case.

Mitchell II also does not conflict with any decision of this Court or of any other Circuit. None of the cases Mitchell has cited [at 7-11 & n.4] involved waiver by repeated failures to request a new trial or to challenge the appellate court's authority to direct entry of judgment for the verdict-loser.

The Tenth Circuit was therefore justified in applying the law of the case. Otherwise,

> . . . there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate of chances from changes in its members.

Roberts v. Cooper, 61 U.S. (20 How.) 529, 530 (1857).

II

This Case Does Not Present Any Nonwaivable "Jurisdictional" Issue.

Realizing that he repeatedly waived his claim for a new trial, Mitchell tries [at 11] to label the Tenth Circuit's action as "jurisdictional." This claim, too, is meritless — and in any event was conclusively decided against him in the first appeal

Mitchell's argument — based on cases under Fed. R. Civ. P. 50(b) — goes only to the particular form of relief ordered by the Tenth Circuit. It is in no way a "jurisdictional" issue.

As the Tenth Circuit correctly pointed out [A-3], it had "jurisdiction" and power under 28 U.S.C. § 2106 to reverse and render judgment for Mobil. Section 2106 authorized it to

> . . . affirm, modify, vacate, set aside or *reverse* any judgment, decree, or order of a court lawfully brought before it for review, and [to] remand the cause *and direct the entry of such appropriate judgment, decree, or order*, or require such further proceedings to be had as may be just under the circumstances. [Emphasis added.]

This "grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment *n.o.v.* on appeal." *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. 317, 322 (1967); *see also Johnson v. New York, N.H. & H. R.R. Co.*, 344 U.S. 48, 65 (1952) (Minton, J., dissenting).

The "jurisdictional" argument was also put to rest when the Tenth Circuit determined in the first appeal that it had jurisdiction to reverse with directions to enter judgment — and Mitchell failed to seek review on that issue.

A court must of course always satisfy itself of its jurisdiction. *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 740 (1976); *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382-86 (1884). "Every court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction." *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938).

In directing entry of judgment for Mobil, and then in denying Mitchell's motion to clarify or amend — which had expressly raised Mitchell's "jurisdictional" argument [A-11 to -12] — the Tenth Circuit necessarily rejected his claim and determined that its earlier opinion and judgment raised no "jurisdictional" issue. *See Mitchell II* [A-3].

Mitchell did not seek review from this Court on this ground, and he should not be allowed to reargue that question in a second appeal. *Stoll v. Gottlieb*, 305 U.S. at 172 ("After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined."); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1050 (5th Cir. 1987).

The law of the case applies to both "jurisdictional" and non-jurisdictional issues. *E.g., Trans World Airlines, Inc. v. Morales*, 949 F.2d 141, 144 (5th Cir. 1991) (applying law of the case because "arguments on this issue are substantially the same as made in the prior appeal. While the prior opinion does not explicitly

discuss it, the necessary assumption is that the prior panel found subject matter jurisdiction present."); *cf. Christianson v. Colt Indus. Operating Corp.*, 486 U.S. at 816 n.5 ("Perpetual litigation of any issue – jurisdictional or nonjurisdictional – delays, and therefore threatens to deny, justice.").

Mitchell I therefore disposed of Mitchell's "jurisdictional" argument. This claim is also meritless for at least four other reasons:

First, the Tenth Circuit's "jurisdiction" over the case derived from Article III of the Constitution and from 28 U.S.C. § 1291 – not from Rule 50(b) or any other procedural rule. The Federal Rules of Civil Procedure do not extend or limit the jurisdiction of the federal courts. Fed. R. Civ. P. 82; Fed. R. App. P. 1; *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 370 (1978). Nor do they extend or limit the jurisdiction of the Courts of Appeals, to which they do not apply. Fed. R. Civ. P. 1 ("These rules govern the procedure in the United States *district courts* . . . .") (emphasis added).

Second, because jurisdiction "is an Art. III as well as a statutory requirement, . . . no action of the parties can confer subject-matter jurisdiction upon a federal court." *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Mobil could neither confer "jurisdiction" on – nor withdraw it from – the Tenth Circuit by making or not making a motion for judgment n.o.v.

Third, even Rule 50(b)'s express requirements are not "jurisdictional" or nonwaivable. For example, although Rule 50(b) states that a party may not move for j.n.o.v. without first having moved for a directed verdict, a verdict-winner can nevertheless waive any objection to a j.n.o.v. motion that was not preceded by a directed-verdict motion, and an appellate court can review the denial of that j.n.o.v. motion. *Collins v. State of Illinois*, 830 F.2d 692, 698 (7th Cir. 1987).

This applies *a fortiori* here, because there is nothing in the actual text of Rule 50(b) that suggests that a j.n.o.v. motion (now

known as a motion for "judgment as a matter of law") is a precondition to the entry of a judgment on appeal.[5]

Fourth, Cone v. West Va. Pulp & Paper Co., 330 U.S. 212 (1947), and its progeny do not say that compliance with Rule 50(b) is a nonwaivable, "mandatory and jurisdictional" prerequisite for entering judgment on appeal in favor of the verdict-loser below [petition at 12]. None of this Court's cases holds that Mitchell's claimed restrictions on the Tenth Circuit's ability to enter judgment involve subject-matter jurisdiction, which is governed by 28 U.S.C. § 1291, or the court's remedial powers, which are conferred by 28 U.S.C. § 2106.[6]

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[5] *Collins* refutes Mitchell's claim [at 13, 6] that "[t]he issue . . . is whether Mobil irretrievably waived or surrendered *its* right to any remedy other than a retrial when it elected in January 1989 not to file post-trial motions." The plaintiff in *Collins* did not "waive" her right to move for j.n.o.v. or to seek appellate review of the evidence even though she had failed to move for a directed verdict. To the contrary, the Seventh Circuit held that it could review the evidence and the denial of the j.n.o.v. motion because the non-moving party — like Mitchell here — had not timely objected to the plaintiff's moving for j.n.o.v. without first having requested a directed verdict.

Mitchell's claim [at 13] that the lack of a j.n.o.v. motion "deprived [him] of the right to move for a new trial or nonsuit" is also wrong. There is no question but that the district court would have denied any j.n.o.v. motion Mobil might have made [A-17], and Rule 50 makes no provision for a trial court to rule conditionally on a verdict-*winner*'s right to a new trial in case of a reversal. Nor could the court have granted Mitchell a nonsuit after entry of judgment. *Williams v. Ford Motor Credit Co.*, 627 F.2d 158, 160 (8th Cir. 1980) (court may not grant post-verdict motion to dismiss without prejudice); *Western Union Tel. Co. v. Dismang*, 106 F.2d 362, 364 (10th Cir. 1939) (court "abused its discretion" in allowing voluntary dismissal after judgment).

[6] Mitchell previously had cited *Johnson v. New York, N.H. & H. R.R. Co.*, 344 U.S. 48 (1952), for the proposition that a Court of Appeals lacks "jurisdiction" to deny a verdict-winner a new trial where the verdict-loser did not move for j.n.o.v. *Johnson*, however, merely noted that 1923 Pennsylvania *state* law — which federal courts sometimes applied under the Conformity Act before the Federal Rules were adopted — had viewed the issue as one of "jurisdiction." 344 U.S. at 52 n.2.

Contrary to Mitchell's citations [at 12] dealing with notice-of-appeal requirements, Fed. R. App. P. 3 and 4 are "not jurisdictional in the sense of subject matter jurisdiction." They are "mandatory precondition[s] to the exercise of jurisdiction" and are therefore "spoken of as jurisdictional . . . in the sense that absent compliance, the court cannot acquire jurisdiction of the case, though otherwise it is a case within the court's subject matter jurisdiction," *Mann v. Lynaugh*, 840 F.2d 1194, 1197 (5th Cir. 1988).

This appeal does not involve any "preconditions" to the Tenth Circuit's acquisition of appellate jurisdiction. The "jurisdiction" discussed in *Mann v. Lynaugh* and *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), is therefore irrelevant. Mitchell also admits [at 12 n.5] that the Tenth Circuit's subject-matter jurisdiction is not at issue. It is difficult to fathom what other type of "jurisdiction" he might be talking about — or why he cannot have waived his new-trial argument, as the Tenth Circuit correctly held.

Mitchell failed on three occasions to present the question he now seeks to raise. Because his claim to a new trial in no way depends on "jurisdiction," he could and did waive it. *Neely v. Martin K. Eby Constr. Co.*, 386 U.S. at 329-30 (new-trial request waived because "not raised in the Court of Appeals or in the petition for a writ of certiorari"); *Morlan v. United States*, 230 F.2d 30, 33 (10th Cir. 1956); *see also Dow Chem. Corp. v. Weevil-Cide Co.*, 897 F.2d 481, 486 n.4 (10th Cir. 1990) ("non-jurisdictional issues waived earlier in the proceedings may not be asserted upon remand").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

HAROLD A. HADDON
HADDON, MORGAN & FOREMAN, P.C.
150 East Tenth Avenue
Denver, Colorado 80203
(303) 831-7364

MICHAEL E. TIGAR
(Counsel of Record)
727 East 26th Street
Austin, Texas 78705
(512) 471-6319

LOREN KIEVE
JONATHAN E. RICHMAN
DEBEVOISE & PLIMPTON
555 13th Street, N.W.
Washington, D.C. 20004
(202) 383-8000

Counsel for Respondents Mobil Oil Corporation, et al.

February 25, 1992

SUPPLEMENTAL APPENDIX

Porter H. MITCHELL,
Plaintiff-Appellee/Cross-Appellant,

v.

MOBIL OIL CORPORATION, a New York corporation;
Retirement Plan of Mobil Oil Corporation;
and Trustees of the Retirement Plan
of Mobil Oil Corporation,
Defendants-Appellants/Cross-Appellees.

Erisa Industry Committee and Association of
Private Pension and Welfare Plans, Amici Curiae.

Nos. 89-1019, 89-1031, 89-1085 and 89-1111.
United States Court of Appeals,
Tenth Circuit.
Feb. 16, 1990.

[Reported at 896 F.2d 463
58 U.S.L.W. 2500,
52 Fair Empl.Prac.Cas. (BNA) 374,
52 Empl. Prac. Dec. ¶ 39,658,
11 Employee Benefits Cas. 2633]

Before MOORE and ANDERSON, Circuit Judges, and DAUGHERTY, District Judge.*

JOHN P. MOORE, Circuit Judge.

In this case, the Mobil Oil Corporation and one of its former employees, Porter Mitchell, dispute whether changes which Mobil made in its employee benefit plan violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, and the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §§ 1001-1461. At trial, Mr. Mitchell succeeded on his age-discrimination and ERISA claims. Mobil challenges the results below, claiming that Mr. Mitchell did not meet his burden of proof on the age-discrimination claim and that he did not have standing to seek relief under ERISA. We agree with Mobil and reverse.

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* The Honorable Frederick A. Daugherty, Senior District Court Judge for the Western District of Oklahoma, sitting by designation.

I. FACTS

Until 1977, Mobil provided retirement benefits only in the form of an annuity. In 1977, Mobil added a "lump-sum option" to its retirement plan, the terms of which, for the purposes of this case, appear in the Retirement Plan of Mobil Oil Corporation as of January 1, 1984 (the Plan). Under the Plan, an employee could elect to receive a lump-sum payment which had the same equivalent actuarial value, discounted at 5%, as the annuity. In the case of early retirement, the Plan reduced the lump-sum payment by 5% for each year of retirement prior to the age of sixty. To qualify for the lump-sum option, an employee had to elect this option prior to retirement; had to be over fifty-five; and, at the date of his retirement, had to have a net worth of at least $250,000 or an accumulated lump sum in excess of $250,000.

In February 1984, Mobil amended the lump-sum option. It raised the discount rate prospectively from 5% to 9.5% and increased the eligibility threshold from $250,000 to $450,000. It also linked the new threshold to the Consumer Price Index (CPI), projecting a rise in the threshold to correlate with a rise in the CPI. These changes, however, would not take effect until at least six months after Mobil announced them, pending approval by the IRS. The delayed effective date gave employees who were eligible for the lump-sum payment under the old criteria, but who might not meet the new threshold, the opportunity to decide whether to retire and take the lump sum or to continue working and accumulating more pension benefits with the possibility that they might not accumulate sufficient additional benefits to meet the new threshold requirement at the date of their retirement.

Porter Mitchell was one of Mobil's employees who had to make such a choice. He was fifty-six at the time Mobil amended the eligibility criteria for the lump-sum option and had elected to take this option instead of the annuity. He was clearly eligible for the lump-sum option under the $250,000 threshold but was uncertain whether he would be able to meet the $450,000 threshold since it could rise, prior to his retirement, with changes

in the CPI. This choice was important to Mr. Mitchell because at the time he was making it, the market interest rate was over 9%. As a result, his lump sum, discounted at 5%, was worth approximately 140% more than his annuity.

At trial, Mr. Mitchell claimed that by forcing him to make this choice, Mobil had willfully violated the ADEA since it had, in effect, constructively discharged him because of his age. He also claimed that Mobil had breached its fiduciary duties under ERISA and that it had violated ERISA's anti-cutback provision, 29 U.S.C. § 1054(g), by retroactively limiting his right to the lump-sum option, an accrued benefit. The age-discrimination and ERISA claims were tried jointly before a jury, though, the trial court reserved for itself a decision on the ERISA claims.

The jury returned a verdict in favor of Mr. Mitchell, awarding $405,962.76 in back-pay damages; $86,000 as compensation for the 20% reduction in Mr. Mitchell's lump-sum benefit; and, $96,740.82 in front-pay damages. Because the jury found that Mobil's violation of the ADEA was willful, the trial court awarded Mr. Mitchell $405,962.76 in liquidated damages as well. The court rejected Mr. Mitchell's claim for prejudgment interest on his ADEA claim. The trial court also ruled in favor of Mr. Mitchell on his ERISA claims, awarding him $588,703.58 in compensatory damages and $405,962.76 in liquidated damages. Mobil appeals both the jury's verdict and the trial court's judgment. Mr. Mitchell cross-appeals the trial court's measure of damages.

II. THE ADEA CLAIM

A. MR. MITCHELL'S PRIMA FACIE CASE

The ADEA prohibits an employer from "discharg[ing] any individual or otherwise discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). To establish a prima facie case of age discrimination by constructive discharge, an employee must prove that his "employer by its illegal discriminatory acts has made working

conditions so difficult that a reasonable person in the employee's position would feel compelled to resign." *Derr v. Gulf Oil Corp.*, 796 F.2d 340, 344 (10th Cir. 1986). An employee who claims that an offer of early retirement constitutes age discrimination by constructive discharge can meet this burden by demonstrating that the offer "sufficiently alters the status quo that each choice facing the employee makes him worse off" and that if he refuses the offer and decides to stay, his employer will treat him less favorably than other employees because of his age. *Bodnar v. Synpol, Inc.*, 843 F.2d 190, 193 (5th Cir.), *cert. denied*, __ U.S. __, 109 S.Ct. 260, 102 L.Ed.2d 248 (1988). An early retirement program which requires an employee to make the difficult choice between retirement with the receipt of previously unavailable incentives and continued work under the same conditions, however, does not result in constructive discharge because the employee is no worse off whichever option the employee chooses. *Henn v. Nat'l Geographic Soc'y*, 819 F.2d 824 (7th Cir.), *cert. denied*, 484 U.S. 964, 108 S.Ct. 454, 98 L.Ed.2d 394 (1987); *Schuler v. Polaroid Corp.*, 848 F.2d 276 (1st Cir. 1988).

Mobil claims that since Mr. Mitchell did not establish a prima facie case of age discrimination by constructive discharge, the trial court erred in rejecting its motion for a directed verdict on the ADEA claim. We will reverse the trial court's denial of a motion for a directed verdict only if, viewed in the light most favorable to the nonmoving party, the evidence and all reasonable inferences to be drawn therefrom point but one way, in favor of the moving party. *Zimmerman v. First Federal Sav. & Loan Ass'n*, 848 F.2d 1047, 1051 (10th Cir. 1988).

Mobil first contends that the trial court erred in denying its motion for a directed verdict because *Derr* precludes recovery for violations of the ADEA absent a showing that an employer subjected its employee to difficult or intolerable working conditions. 796 F.2d at 344. Mr. Mitchell himself admitted at trial that his working conditions were not unpleasant, that he was well regarded by his superiors, and that he enjoyed his work at Mobil. The fact that Mr. Mitchell was happy at Mobil and worked harmoniously with his colleagues and superiors, however, does not preclude a finding that Mobil's offer of early retirement

constituted age discrimination by constructive discharge. The relevant question in this case is whether Mobil's amendment of the Plan forced Mr. Mitchell, and similarly situated employees, to choose between two options both of which would leave him worse off than the status quo.

Mobil contends that it did not confront Mr. Mitchell with such a choice. Instead, it gave him an extra benefit unavailable to employees under the age of fifty-five, the choice to elect the lump-sum option at the $250,000 threshold. Mobil's argument is disingenuous. Its program, unlike that in *Henn*, 819 F.2d at 826, did not give Mr. Mitchell a choice between the receipt of a previously unavailable early retirement incentive and the continuation of work under the status quo which preceded the offer of early retirement. Instead, Mobil created a choice between two options either of which would leave Mr. Mitchell worse off than he had been prior to the change in the Plan. One choice would permit Mr. Mitchell to retire by February 1, 1985, at the age of fifty-six, and receive the lump-sum option under the old eligibility criteria. Prior to Mobil's amending the Plan, however, Mr. Mitchell could have worked until the age of sixty-five and still remain eligible for the lump-sum option under the old criteria. The other choice would permit Mr. Mitchell to continue working, but whereas prior to the Plan's amendment he could be certain to qualify for the lump-sum option, now, because Mobil had increased the threshold and linked it to the CPI, he would have to requalify for this benefit for which he had already become eligible at the age of fifty-five. Moreover, he would never be certain that he could achieve the potentially increasing threshold by retirement age.

As Mobil points out, to establish a prima facie case of age discrimination by constructive discharge, Mr. Mitchell had to prove not only that Mobil confronted him with a choice between two evils but also that Mobil would have treated him and other older employees less favorably, because of their age, had they remained on the job. Mobil asserts that since all employees were subject to the new eligibility criteria, Mr. Mitchell cannot demonstrate that the amendment of the Plan adversely affected him because of his age. Like Mr. Mitchell, employees under the age of fifty-five who had accumulated pension benefits in

excess of $250,000, but less than $450,000, or who had a net worth of between $250,000 and $450,000, also lost the opportunity to obtain the lump-sum benefit under the old criteria. Indeed, for this group of employees that opportunity was irretrievably lost, whereas Mr. Mitchell could still take advantage of it if he chose to retire prior to February 1, 1985.

Mobil's argument ignores the Plan's requirement that an employee be over the age of fifty-five before he can qualify for the lump-sum benefit. Although Mobil's employees who were under age fifty-five at the time Mobil amended the eligibility criteria might have expected to obtain the lump-sum benefit, none of them qualified for it at that time; consequently, only employees over the age of fifty-five who had already qualified to receive the lump-sum benefit, like Mr. Mitchell, would have to *requalify* for it under the new eligibility criteria if they decided to stay on the job. Since Mr. Mitchell did establish, as a matter of law, that he had been constructively discharged because of his age, the trial court properly denied Mobil's motion for a directed verdict.

B. THE JURY CHARGE ON MR. MITCHELL'S PRIMA FACIE CASE

This court will find reversible error in a trial court's jury instructions only if we have substantial doubt whether the instructions, taken together, properly guided the jury in its deliberations. *Lutz v. Weld County School Dist. No. 6*, 784 F.2d 340, 341 (10th Cir. 1986). The paradigmatic instruction on the element of intolerability in a constructive discharge case is "whether the employer by its illegal discriminatory acts has made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign." *Derr*, 796 F.2d at 344. A trial court should, however, tailor this instruction to fit the facts of the case. See *Paolillo v. Dresser Indus., Inc.*, 865 F.2d 37, 40 (2d Cir. 1989).[1]

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1. Indeed, trial judges should always avoid verbatim adoption of language from appellate opinions to formulate instructions. That which is meaningful to those with a legal education is often lost upon others; therefore, a carefully crafted instruction always is tailored to fit the case in language non-lawyers will comprehend.

Mobil contends that the trial court made two errors in its constructive discharge instructions. First, the court did not require the jury to find, as stated in *Derr*, that Mr. Mitchell's working conditions were intolerable or difficult. Instead, the court instructed the jury that it could find constructive discharge by forced retirement if "a reasonable person would also have felt compelled to retire under the circumstances with which Mr. Mitchell was faced in 1984 and 1985." We have no doubt that this instruction properly guided the jury in its deliberations. An instruction patterned after the *Derr* paradigm is particularly apt in cases where an employee, who is a member of a protected class, claims that an employer forced the employee to resign by creating on-the-job conditions directed specifically at that employee. It is less suitable where, as here, an employee claims that the employer's offer of early retirement constitutes age discrimination by constructive discharge. The instruction given takes this distinction into account and is, therefore, properly tailored to the facts of the case.

Mobil also assigns as error the trial court's failure to require the jury to find a link between the choice which Mobil imposed upon Mr. Mitchell by amending the Plan and Mr. Mitchell's age. It specifically objects to the following instruction:

> [T]o take early retirement constitutes constructive discharge, one, if the decision is induced by withholding or reducing or threatening to withhold or reduce benefits from those who choose not to retire, or, two, if each choice facing the employee as a result of the change in the threshold provisions of the retirement plan leaves him worse off than before.[2]

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2. The Association of Private Pension and Welfare Plans, as *amicus curiae*, asserts that the first alternative in this jury charge would effectively outlaw voluntary early retirement programs by prohibiting employers from offering special incentives that will not be available to those who choose to remain employed. Read out of context, the jury charge does support this interpretation which would misstate the law. When the jury instructions are read as a whole, however, the trial court's reference to the "withholding or reducing or threatening to withhold or reduce benefits from those who choose not to retire" clearly addresses those situations in which the employer uses a stick, the reduction or withholding of benefits to which the employee was entitled prior to the offer of early retirement, to force employees to accept an offer of early retirement.

Mobil ignores, however, the trial court's preliminary instruction that Mr. Mitchell "must prove that Mobil's specific employment practices or policies adversely affected people in his age group at a substantially higher rate than they affected those in younger age groups." Since these instructions, taken together, properly state the law governing this case, we reject Mobil's claim that the trial court improperly instructed the jury.

C. RETROACTIVE APPLICATION OF *PUBLIC EMPLOYEES RETIREMENT SYSTEM OF OHIO v. BETTS*

After trial and after Mr. Mitchell filed his Reply Brief, the Supreme Court decided *Public Employees Retirement Sys. of Ohio v. Betts*, __ U.S. __, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989), which redefined the elements of a prima facie case of age discrimination based on changes in an employer's benefits plan by reinterpreting § 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2). That section exempts from liability under the ADEA any employer who "observe[s] the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of" the ADEA. Prior to *Betts*, this court and several other courts of appeal held that an employer had the burden of establishing as an affirmative defense that its early retirement program fell within the exemption of § 4(f)(2) by proving that (1) its plan was bona fide; (2) its actions were in observance of the terms of the plan; and, (3) its plan was not a subterfuge to evade the purposes of the Act. *EEOC v. Cargill, Inc.*, 855 F.2d 682, 684 n.2 (10th Cir. 1988); *EEOC v. Westinghouse Elec. Corp.*, 725 F.2d 211, 223 (3d Cir. 1983), *cert. denied*, 469 U.S. 820, 105 S.Ct. 92, 83 L.Ed.2d 38 (1984); *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 318 (7th Cir.), *cert. denied*, 486 U.S. 1044, 108 S.Ct. 2038, 100 L.Ed.2d 622 (1988). An employer could disprove subterfuge by showing a cost-based justification for age-related reductions in benefits. *See Karlen*, 837 F.2d at 319; *EEOC v. City of Mt. Lebanon*, 842 F.2d 1480, 1492 (3d Cir. 1988); 29 C.F.R. § 860.120(a)(1), (d)(1)-(3) (1980), redesignated 29 C.F.R. § 1625.10(a)(1), (d)(1)-(3) (1988).

The *Betts* court implicitly overruled this prior case law. It held that § 4(f)(2) is not an affirmative defense which the employer

has the burden of proving, but rather part of the plaintiff's prima facie case. 109 S.Ct. at 2868. Under *Betts*, an employee who claims that his employer's benefits program violates the ADEA bears the burden of proving subterfuge by showing "that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some nonfringe-benefit aspect of the employment relationship," such as hiring and firing or wages and salaries. *Id.* We must now determine whether, as Mobil contends, *Betts* should be retroactively applied to this case.

Our determination whether to apply *Betts* retroactively requires the weighing of three factors: (1) whether *Betts* "establish[es] a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; (2) whether, after looking at the prior history of the *Betts* rule and at its purpose and effect, "retrospective operation will further or retard its operation"; and, (3) whether retroactive application of the *Betts* rule would be inequitable. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355-56, 30 L.Ed.2d 296 (1971) (citations omitted). Each factor need not compel prospective application. *Jones v. Consolidated Freightways Corp.*, 776 F.2d 1458, 1460 (10th Cir. 1985). Where, for example, a decision " 'could produce substantial inequitable results if applied retroactively, there is ample basis . . . for avoiding the "injustice or hardship" by a holding of nonretroactivity.' " *Chevron*, 404 U.S. at 107, 92 S.Ct. at 355 (quoting *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S.Ct. 1897, 1900, 23 L.Ed.2d 647 (1969) (per curiam)).

Betts clearly established a new principle of law by transforming what had been an affirmative defense into an element of an employee's prima facie case. Prior to *Betts*, every circuit which addressed the applicability of § 4(f)(2) to claims of age discrimination in employee benefit programs viewed it as an affirmative defense. *Potenze v. New York Shipping Ass'n, Inc.*, 804 F.2d 235, 237 (2d Cir. 1986), *cert. denied*, 481 U.S. 1029, 107 S.Ct. 1955, 95 L.Ed.2d 528 (1987); *EEOC v. City of Mt. Lebanon*, 842 F.2d 1480, 1488 (3d Cir. 1988); *Crosland v. Charlotte Eye, Ear and Throat Hosp.*, 686 F.2d 208, 211 (4th

Cir. 1982); *Betts v. Hamilton County Bd. of Mental Retardation and Developmental Disabilities*, 848 F.2d 692, 694-95 (6th Cir. 1988), *rev'd sub nom. Public Employees Retirement Sys. of Ohio v. Betts*, __ U.S. __, 109 S.Ct. 2854, 106 L.Ed.2d 134 (1989); *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 318 (7th Cir.), *cert. denied*, 486 U.S. 1044, 108 S.Ct. 2038, 100 L.Ed.2d 622 (1988); *EEOC v. Borden's, Inc.*, 724 F.2d 1390, 1395 (9th Cir. 1984); *EEOC v. Cargill, Inc.*, 855 F.2d 682, 684 (10th Cir. 1988). None even considered that § 4(f)(2) established an element of plaintiff's prima facie case. This *Chevron* factor, therefore, strongly favors nonretroactive application of *Betts*.

Retroactive application of *Betts* in this case would not further the purpose behind its new interpretation of § 4(f)(2): to exempt "the provisions of a bona fide benefit plan from the purview of the ADEA so long as the plan is not a method of discriminating in other, nonfringe-benefit aspects of the employment relationship." 109 S.Ct. at 2866. Mr. Mitchell asserts that Mobil constructively discharged him because of his age by manipulating the availability of the lump-sum benefit. In other words, Mr. Mitchell claims that Mobil used its benefit plan to discriminate against him in a nonfringe-benefit aspect of the employment relationship. His claim is exactly the type from which the *Betts* court did not intend to insulate employers. Retroactively applying *Betts*, however, would, in effect, insulate Mobil from Mr. Mitchell's claim because Mr. Mitchell did not present as part of his prima facie case evidence of Mobil's intent to use the amendment of the lump-sum provision to discriminate against him in a nonfringe-benefit aspect of the employment relationship. The second *Chevron* factor, therefore, also weighs against retroactive application of *Betts*.

Considerations of equity also undercut Mobil's contention that *Betts* should be applied retroactively. Mobil first mentioned § 4(f)(2) in its Reply Brief, filed just over two weeks after *Betts* was decided. Despite the fact that § 4(f)(2) was available to Mobil as an affirmative defense prior to *Betts*, Mobil did not plead that defense in its Answer or in its Answer to the Amended Complaint. Not surprisingly, Mr. Mitchell presented no evidence at trial on the applicability of § 4(f)(2) to his claims, nor did

Mobil. Since this case proceeded for over three years prior to Mobil's filing its Reply Brief – through discovery, trial, and initial briefing on appeal – without any mention of § 4(f)(2) as an affirmative defense for Mobil, it would work a grave injustice for us to hold that *Betts* applies retroactively.[3] This result is one which we must avoid.

D. MOBIL'S BUSINESS JUSTIFICATION AND MR. MITCHELL'S CLAIM OF PRETEXT

If an employee establishes his prima facie case of age discrimination by constructive discharge, the employer then has the opportunity to rebut the presumption of discrimination by producing evidence of a legitimate, nondiscriminatory business reason for its conduct. *EEOC v. University of Oklahoma*, 774 F.2d 999, 1002 (10th Cir. 1985), *cert. denied*, 475 U.S. 1120, 106 S.Ct. 1637, 90 L.Ed.2d 183 (1986); *Connecticut v. Teal*, 457 U.S. 440, 446-47, 102 S.Ct. 2525, 2530-31, 73 L.Ed.2d 130 (1982). To prevail, the employee must then prove that the employer's proffered justification is "a mere pretext for discrimination." *Teal*,

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3. In *Robinson v. County of Fresno*, 882 F.2d 444 (9th Cir. 1989), the Ninth Circuit applied *Betts* retroactively without resorting to the *Chevron* inquiry. In that case, Mr. Robinson, an employee of the County of Fresno, claimed that a modification to the County's retirement plan violated the ADEA because it resulted in his receiving a smaller pension than other retirees who were younger at the time of hiring. *Id.* at 445. The Ninth Circuit affirmed the district court's granting of the County's motion for summary judgment because Mr. Robinson had not established, as Betts requires, that the county intended the modification to the plan to discriminate against him in an aspect of the employment relationship unrelated to fringe benefits. *Id.* at 447.

We believe that even if the Ninth Circuit had applied the *Chevron* test, the result would have been the same. *Robinson*, nonetheless, is distinguishable from this case. Mr. Robinson did not assert, as Mr. Mitchell does, that the modification to the County's plan discriminated against him in a nonfringe-benefit aspect of the employment relationship such as hiring and firing or wages and salaries. A refusal to apply *Betts* retroactively, therefore, would have retarded the purpose behind that decision. In addition, since *Robinson* was only at the summary judgment stage at the time *Betts* was decided, applying *Betts* retroactively would not result in the high degree of injustice which retroactive application would cause in this case.

457 U.S. at 447, 102 S.Ct. at 2530. The employee can establish pretext "by showing that the employer's proffered explanation is unworthy of credence." *University of Oklahoma*, 774 F.2d at 1002.

Mobil claims that since it forwarded a legitimate business justification and Mr. Mitchell failed to prove that it was a pretext, the trial court erred in denying its motion for a directed verdict. We will reverse the trial court's denial of a motion for a directed verdict only if, viewed in the light most favorable to the nonmoving party, the evidence and all reasonable inferences to be drawn therefrom point but one way, in favor of the moving party. *Zimmerman*, 848 F.2d at 1051. Alternatively, Mobil claims that the evidence was insufficient to support the jury's finding in favor of Mr. Mitchell on this issue. We will uphold the jury's verdict unless it is clearly erroneous, or there is a lack of evidence to support it. *Colorado Coal Furnace Distribs. v. Prill Mfg.*, 605 F.2d 499, 502 (10th Cir. 1979).

At trial, Mr. Mitchell claimed that Mobil's raising the eligibility threshold for the lump sum from $250,000 to $450,000 and linking it to the CPI combined with its delaying for six months the effective date of these changes forced him to choose early retirement, resulting in age discrimination by constructive discharge. Mobil introduced evidence to justify both of these amendments to the Plan. It claimed that because inflation had eroded the real dollar value of the $250,000 threshold, which had been set in 1977, the number of employees who were eligible for, and taking advantage of, the lump-sum option had increased dramatically, creating a serious drain on Mobil's pension fund. By increasing the threshold to $450,000 and linking it to the CPI, Mobil would both restore the threshold to the equivalent of its original level in 1977 dollars and protect it from future erosion by inflation. These changes in turn would stop the drain on Mobil's pension plan resulting from the overutilization of the lump-sum option.

Mobil claimed that it delayed the effective date of these changes, rather than implementing them immediately, out of fairness to its employees. The six-month notice period would

give Mobil employees an adequate transition period to consider their choice rather than simply pulling the rug out from under them. It would also give retiring employees, who were earning their peak salaries, six months to accrue additional pension benefits since Mobil calculated these benefits based on a retiring employee's highest average salary over a period of thirty-six months.

At trial, Mr. Mitchell asserted that these justifications were unworthy of credence. He contended that Mobil amended the Plan in the manner it did to force the retirement of older Mobil employees who would become redundant as a result of an impending merger with Superior Oil Company. Mr. Mitchell asserted that Mobil needed to force these employees into early retirement to avoid large severance payments which the merger agreement required it to make to Superior employees laid off as a result of the merger. Mobil could achieve this objective only by combining an increase in the threshold with a notice period during which employees would be forced to retire early to obtain the lump-sum benefit.

Mr. Mitchell contends that several circumstances which he proved support his claim of pretext. In September 1983, mid-level Mobil executives began considering alternatives to the $250,000 threshold. In mid-December, the Mobil executive primarily responsible for changes to the Plan informed his superior — the Vice President for Employee Relations, who was also a member of the Executive Committee of Mobil's Board of Directors — that an increase in the threshold would require notice to employees and a transition plan to control the accelerated retirements of employees eligible for the lump sum. On January 9, 1984, the Executive Committee requested the Vice President for Employee Relations to continue the evaluation of an increase in the threshold and directed him to incorporate into future proposals for change a reasonable transition period between the announcement of the increased threshold and its effective date during which employees could take advantage of the old eligibility criteria.

On February 9, 1984, Mobil's Executive Committee adopted the increase in the threshold to $450,000 and linked it to the

CPI. It also decided to give employees at least six months' notice of this change so they could retire and obtain the lump sum under the old eligibility requirements. The Executive Committee recognized that the announcement of an increase in the threshold approximately six months prior to the effective date of the change would lead to the early retirement of between 1000 and 1300 employees.

One week prior to its February 9 meeting, the Executive Committee reviewed "at length"[4] the possibility of a merger with Superior and authorized Mobil's President to proceed with negotiations. Mr. Mitchell contends that because the Executive Committee reviewed the opportunity to merge with Superior at length on February 2, 1984, one can reasonably infer that the Executive Committee knew about the redundancy problem which would result from the merger prior to January 9, 1984, when it directed the Vice President for Employee Relations to incorporate a notice period into any future proposals for changes to the Plan. Mr. Mitchell produced no evidence to support this inference, however, and the record does not otherwise indicate any link between Mobil's merger with Superior and the Executive Committee's decision at its January 9 meeting to incorporate a notice period into any future changes in the Plan. In fact, the evidence points the other way since the Executive Committee adopted the transition period just one week after it authorized Mobil's President to negotiate with Superior and over one month before Mobil and Superior signed the merger agreement. The inference which Mr. Mitchell asks us to draw, therefore, is not a reasonable one, and his claim of pretext must fail. *See Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 521 (10th Cir. 1987) (quoting *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 895 (3d Cir.), *cert. denied*, 454 U.S. 893, 102 S.Ct. 390, 70 L.Ed.2d 208 (1981)) ("An inference is reasonable where 'there is a reasonable probability that the conclusion flows from the proven facts.' ")

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4. *See* "Excerpt from Minutes of Executive Committee Meeting held on Thursday, February 2, 1984." (Addendum to Brief of Mobil Oil Corporation, Plaintiff's Exhibit 177). The term "at length" is not defined in the minutes, and we find no other description in the record indicating the length of the review or what it entailed.

Since Mr. Mitchell did not meet his burden of production on the issue of pretext, the onerous effects of the changes in the plan notwithstanding, we reverse the trial court's denial of Mobil's motion for a directed verdict. Because we hold that Mobil did not violate the ADEA, we need not review Mr. Mitchell's cross-appeal on issues relating to the measure of damages.

III. THE ERISA CLAIMS

At trial, Mr. Mitchell claimed that Mobil's amendments to the Plan violated both § 204(g) of ERISA, 29 U.S.C. § 1054(g), which prohibits employers from reducing the accrued benefits of participants in a benefit plan, and § 510 of ERISA, 29 U.S.C. § 1140, which prohibits an employer from discriminating against a participant "for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan." Mr. Mitchell also claimed that Mobil breached its duty as the fiduciary of the Plan by amending the Plan in the manner that it did. After determining that Mr. Mitchell met ERISA's requirements for standing, the district court held in his favor on all of his ERISA claims and awarded him $588,703.58 in compensatory damages and $405,962.76 in liquidated damages. Mobil challenges the district court's conclusion that Mr. Mitchell had standing as well as its holdings in his favor. Since Mobil's appeal involves pure questions of law, our review of the trial court's holdings is *de novo*. *Sage v. Automation, Inc. Pension Plan and Trust*, 845 F.2d 885, 890 (10th Cir. 1988).

ERISA and its legislative history emphasize Congress's intent to provide those protected by the Act "ready access to the federal courts," 29 U.S.C. § 1001(b), and liberal remedies. *See* S. Rep. No. 127, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4838, 4871;[5] H.R. Rep. No. 533,

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5. This report of the Senate Labor and Public Welfare Committee states:

> The enforcement provisions [of ERISA] have been designed specifically to provide both the Secretary [of Labor] and *participants and beneficiaries* with broad remedies for redressing or preventing violations of the [Act]. . . . The intent of the Committee

(Footnote continued)

93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 4639, 4647.[6] Although the Act has a broad remedial purpose, only participants, beneficiaries, and fiduciaries of an employee benefit plan may avail themselves of its protections. 29 U.S.C. § 1132(a). This limitation on the group of potential claimants is necessary to avoid the creation of uncertainties about an employer's obligations under ERISA and to prevent the imposition of "great costs on pension plans for no legislative purpose." *Saladino v. I.L.G.W.U. Nat'l Retirement Fund*, 754 F.2d 473, 476 (2d Cir. 1985).

ERISA defines a "participant" as "any employee or former employee of an employer . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer." 29 U.S.C. § 1002(7). This definition includes "former employees who 'have . . . a reasonable expectation of returning to covered employment' or who have 'a colorable claim' to vested benefits." *Firestone Tire and Rubber Co. v. Bruch*, __ U.S. __, 109 S.Ct. 948, 958, 103 L.Ed.2d 80 (1989) (quoting *Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.) (per curiam), *cert. denied*, 479 U.S. 916, 107 S.Ct. 318, 93 L.Ed.2d 291 (1986)). It excludes, however, former employees who have received a lump-sum payment of all their vested benefits because "these erstwhile participants have already received the full extent of their benefits and are no longer eligible to receive future payments." *Joseph v. New Orleans Electrical Pension & Retirement Plan*, 754 F.2d 628, 630 (5th Cir.),

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> is to provide the full range of legal and equitable remedies available in both state and federal courts and to remove jurisdictional and procedural obstacles which in the past appear to have hampered effective enforcement of fiduciary responsibilities under state law or recovery of benefits *due participants*.

(Emphasis added.)

6. This report of the House Committee on Education and Labor states:

> [T]he Committee recognizes the absolute need that safeguards for *plan participants* be sufficiently adequate and effective to prevent the numerous inequities to workers under plans which [inequities] have resulted in tragic hardship to so many.

(Emphasis added.)

cert. denied, 474 U.S. 1006, 106 S.Ct. 526, 88 L.Ed.2d 458 (1985). These claimants seek a damage award, not vested benefits improperly withheld. *Kuntz*, 785 F.2d at 1411. The fact that an employee takes his lump sum under protest does not preserve his standing as long as an employer properly pays out all the vested benefits owed to the employee. *Yancy v. American Petrofina, Inc.*, 768 F.2d 707, 708-09 (5th Cir. 1985).

Mobil claims that the trial court erred in granting Mr. Mitchell standing because he has never had a reasonable expectation of returning to covered employment, nor does he have a colorable claim to vested benefits. We agree. After Mr. Mitchell retired on January 1, 1985, he received all of his vested pension benefits in a single lump sum. Although he filed a protest under Mobil's internal procedures, he did not claim that Mobil had improperly withheld vested benefits. He also did not make such a claim in his complaint, nor did he seek reinstatement. Instead, he claimed that Mobil's violation of ERISA entitled him to additional benefits which he would have received had Mobil's amendments to the Plan not compelled him to retire at fifty-six, rather than sixty. Since these benefits had not yet vested, Mr. Mitchell could not have a colorable claim to vested benefits, but only a claim for compensatory damages. Furthermore, Mr. Mitchell never sought reinstatement; therefore, he also could not have a reasonable expectation of returning to covered employment. Because Mr. Mitchell failed to prove that he was still a participant in the Plan, it is inescapable that he did not have standing to seek enforcement of his ERISA claims. The trial court's holding that Mr. Mitchell is entitled to recover under ERISA, therefore, must be reversed.

For the foregoing reasons, we REVERSE the judgments of the district court.

NO. 90-297

IN THE SUPREME COURT OF THE UNITED STATES

PORTER H. MITCHELL, Petitioner,

v.

MOBIL OIL CORPORATION, a New York corporation; Retirement Plan of Mobil Oil Corporation; and Trustees of the Retirement Plan of Mobil Oil Corporation; Respondent.

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI

To the Honorable Byron R. White, Associate Justice of The Supreme Court of the United States and Circuit Justice for the Tenth Circuit:

Petitioner Porter H. Mitchell, pursuant to Sup. Ct. R. 13.2, 30.2 and 30.3, prays for an extension of time in which to file his petition for certiorari in this Court. He requests twenty-one (21) calendar days from the date of the Tenth Circuit's ruling on a motion presently pending before that Court in this matter, to a maximum of sixty (60) days, to and including, September 14, 1990.

The opinion of the Tenth Circuit Court of Appeals was issued on February 16, 1990 and is published, *Mitchell v. Mobil Oil Corp.*, 896 F.2d 463 (10th Cir. 1990). Final judgment was also entered on that same date. On March 2, 1990 Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc which was denied by the Tenth Circuit on April 17, 1990. Therefore, Petitioner's time to petition for certiorari expires July 16, 1990. This application is being filed more than ten days before that date.

Copies of the judgment appealed from and the Order denying the petition for rehearing, are attached hereto. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1)(1990 Cum.Supp.).

As shown by the documents attached, this case involved claims by Petitioner against his former employer under the Age Discrimination In Employment Act, 29 U.S.C. § 623 ("ADEA") and the Employee Retirement Income Security Act, 29 U.S.C. §§ 1054 and 1140 ("ERISA"). At trial, a jury returned a verdict in favor of Petitioner on the age discrimination claim and the trial court found in favor of Petitioner on the ERISA claims.

The Tenth Circuit Court of Appeals, however, reversed both judgments holding that the trial court erred in failing to direct a verdict against petitioner on the ADEA claim and that petitioner had no standing to assert claims under ERISA. Petitioner will seek certiorari as to both holdings on the grounds that: (a) the Tenth Circuit decided federal questions in a way conflicting with applicable decisions of the United States Supreme Court; and (b) the Tenth Circuit so far departed from the accepted and usual course of judicial proceedings in this matter as to call for an exercise of this Court's power of supervision.

On June 21, 1990, Petitioner filed a motion entitled "Motion for Clarification of the February 16, 1990 Opinion and Judgment, and Alternatively, Motion to Amend Judgment and Mandate to Expressly Order a New Trial" (copy attached). The Motion is based on an ambiguity in the Tenth Circuit's reversal, as to whether it grants Petitioner a new trial on the ADEA claim or orders the trial court to dismiss petitioner's claims without a new trial. Respondent failed to move under Fed.R.Civ. P. 50(b) for a judgment notwithstanding the verdict (j.n.o.v.) in the trial court. Clear precedent of this Court holds a court of appeals is powerless to grant a directed verdict absent filing by the verdict loser of a F.R.C.P. 50(b) motion for judgment n.o.v. Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212 (1947); Globe Liquor Co. v. San Roman, 332 U.S. 571 (1948); Johnson v. New York, New Haven & Htfd. Rd. Co., 344 U.S. 48 (1952). Mobil filed its response on June 28, 1990 (copy attached).

The purpose of this request for additional time is to avoid the necessity of petitioner filing two separate petitions for certiorari at two different times, thereby needlessly consuming resources of this Court and the parties. If the Tenth Circuit determines that Petitioner is not entitled to a new trial on his ADEA claim, despite Mobil's failure to file a motion for judgment n.o.v., then he intends to present an issue to this Court relating to such determination. The twenty-one (21) calendar days will provide petitioner sufficient time to posture and brief the issue and adjust the length of his arguments on the other issues accordingly.

WHEREFORE, Petitioner Porter H. Mitchell respectfully requests that this Court enter an order extending his time to petition for certiorari to twenty-one (21) calendar days after the date of the Tenth Circuit's ruling on petitioner's June 21, 1990 motion, to a maximum of sixty (60) days, to and including September 14, 1990 and for such other and further relief as the Court may deem proper under the circumstances.

Respectfully submitted,

PRYOR, CARNEY & JOHNSON
A Professional Corporation

By: /s/ Thomas L. Roberts
Thomas L. Roberts
6200 South Syracuse Way
Suite 400
P.O. Box 6559
Englewood, CO 80111
(303) 771-6200

July 2, 1990

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case Nos. 89-1019, 89-1031, 89-1085, and 89-1111

PORTER H. MITCHELL,

Plaintiff-Appellee/Cross-Appellant,

v.

MOBIL OIL CORPORATION, et al.,

Defendant-Appellant/Cross-Appellee.

SECOND MOTION FOR EXTENSION OF STAY OF MANDATE

COMES NOW plaintiff-appellee/cross-appellant Porter H. Mitchell and, pursuant to F.A.R. 41(b), hereby moves this Court for the continuance of his stay of mandate pending application to the United States Supreme Court for writ of certiorari, and AS GROUNDS THEREFOR, states as follows:

1. At present, Mr. Mitchell's petition for certiorari is due in the United States Supreme Court on July 16, 1990.

2. Mitchell filed a Motion for Extension of Stay of Mandate in this Court on April 24, 1990.

3. By Order dated May 8, 1990, this Court granted his Motion staying the mandate until the filing of his petition for certiorari on or before July 16, 1990, and to continue until final disposition of his case by the Supreme Court.

4. On June 21, 1990, Mitchell filed a motion with this Court seeking clarification of its February 16, 1990 opinion and judgment, or in the alternative, to amend the mandate and order a new trial. Mobil filed its response on June 28, 1990.

5. Contemporaneous with this motion, Mr. Mitchell is filing a Motion for Extension of Time to File Petition for Writ of Certiorari in the United States Supreme Court (copy attached) requesting an extension of twenty-one (21) calendar days from the date of this Court's ruling on the June 21 Motion to a maximum of sixty (60) days from July 16, 1990 (to and including September 14, 1990), which ever comes earlier.

6. As stated in the original motion for stay of mandate, in the opinion of counsel, the instant matter presents special and important reasons for issuance of a writ of certiorari and should this Court declare that the district court is ordered to enter judgment for Mobil on the ADEA claim on remand despite Mobil's failure to move for judgment notwithstanding the verdict, Mitchell desires to challenge that ruling as well in his petition for certiorari. To avoid the necessity of requesting piecemeal review of this Court's decisions, Mitchell requests further stay of the mandate corresponding with any extension of time granted by the Supreme Court.

WHEREFORE, plaintiff-appellee/cross-appellant Porter H. Mitchell, respectfully requests this Court enter its order is filed [sic] with the United States Supreme Court on or before September 14, 1990, and to continue until final disposition of the entire matter by the United States Supreme Court.

Respectfully submitted,

PRYOR, CARNEY AND JOHNSON,
a Professional Corporation

By: /s/ Thomas L. Roberts

Thomas L. Roberts, Esq.
Rodney R. Patula, Esq.
Peter H. Ziemke, Esq.
6200 S. Syracuse Way, #400
Englewood, CO 80111
(303) 771-6200

ATTORNEYS OF RECORD FOR
PORTER H. MITCHELL

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case Nos. 89-1019, 89-1031, 89-1085, and 89-1111

PORTER H. MITCHELL,

Plaintiff-Appellee/Cross-Appellant,

v.

MOBIL OIL CORPORATION,

Defendants-Appellants/Cross-Appellees.

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC OF PORTER H. MITCHELL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

CASE NO. 86-Z-585

The Honorable Zita L. Weinshienk, Presiding

Judgement Entered January 5, 1989
After Trial to Jury (ADEA Claims)
and the Court (ERISA Claims)

Argued September 29, 1989
(before Moore and Anderson, Circuit Judges,
and Daugherty, District Judge sitting by designation)

Opinion Issued February 16, 1990
(By MOORE, J., joined by Anderson, J.,
and Daugherty, D.J.)

ATTORNEYS FOR PORTER H. MITCHELL:
THOMAS L. ROBERTS
RODNEY R. PATULA
PETER H. ZIEMKE
PRYOR, CARNEY AND JOHNSON
a Professional Corporation
6200 S. Syracuse Way, Suite 400
Englewood, CO 80111
(303) 771-6200

Submitted: March 9, 1990

Pursuant to Fed. R. App. P. 40(a) and 35(b) and Tenth Cir. R. 40 and 35, Porter H. Mitchell ("Mitchell") hereby petitions this Honorable Court for rehearing of this matter and suggests rehearing en banc.[1]

INTRODUCTION

Mitchell sued Mobil, his former employer, for age discrimination and violations of ERISA. In July 1984, Mobil announced that the threshold requirement employees had to satisfy to take their pension in a lump sum would be increased from $250,000 to $450,000 in accrued pension or personal net worth. The change was delayed for six months ostensibly to allow employees qualifying under the lower threshold, but not the higher one, to take the lump sum. However, they could do so only by retiring prematurely.

Since the lump sum was so much more valuable than the annuity benefit – due to discount rates and the fact that the annuity essentially disappeared upon death – Mitchell and more than 1,000 other retirement-eligible employees retired early. Mobil thus achieved what looked like a voluntary, early retirement program without spending the money for incentives which make such programs legal, saving nearly $300 million in salaries and related benefits.

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1 10th Cir. R. 35.2 Essential Allegations: I express a belief, based on a reasoned and studied professional judgment, that the panel decision of February 16, 1990 is contrary to the following decisions of the United States Supreme Court and the Tenth Circuit Court of Appeals and their progeny, and that consideration by the full Court is necessary to serve and maintain uniformity of decisions in this Circuit: *Texas Dept. of Comm. Affairs v. Burdine*, 450 U.S. 248, 67 L.Ed.2d 207, 101 S.Ct. 1089 (1981); *Anderson v. Bessemer City*, 470 U.S. 564, 84 L.Ed.2d 518, 105 S.Ct. 1504 (1985); *EEOC v. University of Okla.*, 774 F.2d 999 (1985), *cert. denied*, 475 U.S. 1120 (1986); *EEOC v. Prudential Fed. S & L Assoc.*, 763 F.2d 1166 (10th Cir. 1985), *cert. denied*, 474 U.S. 946 (1985); *Firestone Tire & Rubber Co. v. Bruch*, __ U.S. __, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989); *Spulak v. K-Mart*, 894 F.2d 1150 (10th Cir. 1990); *Colorado Coal Finance Dist. v. Prill Mfg.*, 605 F.2d 499 (10th Cir. 1979); *Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144 (10th Cir. 1978), *cert. denied*, 439 U.S. 862 (1978). /s/ Thomas L. Roberts Counsel for Porter H. Mitchell.

At trial, the jury found that Mobil constructively discharged Mitchell in violation of ADEA. Also, based on internal memoranda of Mobil and the testimony of Mobil executives on cross-examination, the jury found that the ADEA violations were willful. The District Court thus awarded ADEA liquidated damages, and also found that Mobil had violated ERISA.

The panel of this Court reversed both judgments and ordered dismissal. As to ADEA, the panel held that the jury was properly instructed and that Mitchell had proved a prima facie case of constructive discharge. However, the Court ruled that Mitchell failed to prove that the "business justification" articulated by Mobil was a mere pretext for discrimination. As to ERISA, the panel held that Mitchell lacked standing to sue.

As detailed below, the business justification upon which the panel's decision is based was so discredited by cross-examination of Mobil executives that Mobil itself abandoned the theory of justification at trial. Apparently, the panel overlooked those parts of the record. Also, the panel's analysis of Mitchell's case of pretext ignores the evidence Mitchell presented in support of his prima facie case – contrary to Supreme Court and Tenth Circuit precedent. The panel assumed that Mitchell advanced at trial but one theory of pretext, perhaps because Mobil attacked only one theory on appeal. In fact, however, Mitchell showed pretext several ways, recognized by governing law as sufficient. The evidence supporting those other theories of pretext was more than adequate to sustain the jury's verdict, and in one instance, the evidence was unchallenged.

As to ERISA, the panel's decision depends upon the conclusion that Mitchell never sought reinstatement as a remedy. Yet the record shows that he expressly did so – both in his Amended Complaint and the Stipulated Pretrial Order.[2]

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2 The ground upon which the panel relied in reversing the jury's finding of willful age discrimination (that Mitchell did not meet his burden of production on the issue of pretext) was not stressed in the briefs and was not mentioned at oral argument due to the deference which appellate courts afford jury findings on appeal. There was much discussion, however, of Mitchell's

(Footnote continued)

* * *

WHEREFORE, upon the foregoing, Mitchell's Petition should be granted. The Court should vacate Sections II.D and III of its February 16, 1990 decision, and restore this cause on the docket for rehearing, by the original panel or en banc. After rehearing, the Court should issue its decision affirming the judgment entered on the jury verdict, holding that petitioner had standing to prosecute his ERISA claims and affirming the trial Court's judgment in favor of petitioner on those claims. The Court should also award petitioner the relief sought in his cross-appeal.

Respectfully submitted,

PRYOR, CARNEY AND JOHNSON,
a Professional Corporation

By: /s/ Thomas L. Roberts

Thomas L. Roberts, Esq.
Rodney R. Patula, Esq.
Peter H. Ziemke, Esq.
6200 S. Syracuse Way, Suite 400
Englewood, CO 80111
(303) 771-6200

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evidence of pretext in the contexts of willfulness and Mobil's violation of fiduciary duties. Mitchell Br. at 5-12, 15-17 and 30-31; Supplemental Addendum: Statement of Briefing Corrections and Errata (filed August 30, 1989) at 5-9. Whether specifically labeled as evidence of pretext or not, Mitchell is entitled to the benefit of *all* evidence in the record to support ADEA verdict. [See, § II, infra and Supreme Court and Tenth Circuit cases there cited.]

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

Case Nos. 89-1019, 89-1031, 89-1085, and 89-1111

PORTER H. MITCHELL,

Plaintiff-Appellee/Cross-Appellant,

v.

MOBIL OIL CORPORATION,

Defendants-Appellants/Cross-Appellees.

STIPULATED MOTION BY PORTER H. MITCHELL FOR A FIVE BUSINESS DAY EXTENSION OF TIME TO FILE PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC OF PORTER H. MITCHELL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

CASE NO. 86-Z-585

The Honorable Zita L. Weinshienk, Presiding

Judgement Entered January 5, 1989
After Trial to Jury (ADEA Claims)
and the Court (ERISA Claims)

Argued September 29, 1989
(before Moore and Anderson, Circuit Judges,
and Daugherty, District Judge sitting by designation)

Opinion Issued February 16, 1990
(By MOORE, J., joined by Anderson, J., and Daugherty, D.J.)

ATTORNEYS FOR PORTER H. MITCHELL:
THOMAS L. ROBERTS
RODNEY R. PATULA
PETER H. ZIEMKE
PRYOR, CARNEY AND JOHNSON
a Professional Corporation
6200 S. Syracuse Way, Suite 400
Englewood, CO 80111
(303) 771-6200

Filed: March 1, 1990

COMES NOW Appellee/Cross-Appellant, Porter H. Mitchell, pursuant to Local Rule 27.4 of this Court, and hereby requests an extension of time of five business days to and including Friday, March 9, 1990, within which to file his Petition for Rehearing and Suggestion for Rehearing En Banc, and AS GROUNDS THEREFOR, states as follows:

1. This Court's opinion in this matter issued on February 16, 1990, making movant's Petition for Rehearing and Suggestion for Rehearing due 14 days later on March 2, 1990.

2. Due to the President's Day holiday on Monday February 19, 1990, counsel for Mr. Mitchell did not receive and was not aware of the Court's opinion until February 20, 1990.

3. The panel's opinion reverses judgments entered on the jury's verdict on the ADEA claims and the District Court's findings on the ERISA claims and calls for total dismissal of plaintiff's claims, not merely remand for retrial, compelling plaintiff to exhaust all possible avenues of relief.

4. The bases of the panel's decision require reexamination of the entire record including voluminous trial exhibits, which cannot reasonably be done within the ordinary time allotted.

5. Due to the complexity of the legal issues and factual record which need to be distilled and presented in an extremely condensed fashion, an adequate Petition and Suggestion cannot reasonably be prepared by March 2, 1990.

6. This motion for enlargement under Rule 27.4.4. would ordinarily have been due on February 23, 1990, only three days after receipt of the opinion. This was before counsel had adequate opportunity to evaluate the need for additional time although counsel has diligently worked on the Petition and Suggestion.

7. No prior extensions have been requested, and granting this extension will not unduly delay ultimate resolution of this matter; nor is this request interposed for the mere purpose of delay.

8. This motion is unopposed. Counsel for Defendant-Appellant Mobil Oil Corporation has no objection to and has stipulated to this enlargement of time until March 9, 1990.

WHEREFORE, Porter H. Mitchell respectfully requests this Honorable Court to extend the time to and including Friday, March 9, 1990, within which to file his Petition for Rehearing and Suggestion for Rehearing En Banc and for such other relief as the Court may deem appropriate under the circumstances.

Respectfully submitted,

PRYOR, CARNEY AND JOHNSON,
a Professional Corporation

By: /s/ Thomas L. Roberts

Thomas L. Roberts, Esq.
Rodney R. Patula, Esq.
Peter H. Ziemke, Esq.
6200 S. Syracuse Way, Ste. 400
Englewood, CO 80111
(303) 771-6200

ATTORNEYS OF RECORD FOR
PORTER H. MITCHELL

Listing Pursuant to Sup. Ct. R. 29.1 of Mobil Oil Corporation's Parent and Non-Wholly-Owned Subsidiaries of Which Mobil Oil Corporation Owns at Least 5% (as of February 18, 1992)

MOBIL CORPORATION (PARENT)

ABRORAY PTY. LIMITED
ABU DHABI PETROLEUM COMPANY LIMITED
ACE POLYMER CO., LTD.
ADRIA WIEN PIPELINE GESMBH
AIMCO (ALPHA) SHIPPING COMPANY
AIMCO (OMEGA) SHIPPING COMPANY LTD.
AIRCRAFT FUEL SUPPLY B.V.
AIRTANKDIENST KOELN
AK CHEMIE GMBH & CO. KG
AKAUMA ASPHALT INDUSTRIES, LTD.
ALEXANDROUPOLIS PETROLEUM INSTALLATION S.A.
ALTONA PETROCHEMICAL COMPANY LIMITED
AMMENN GMBH
ANDREWS OIL PTY. LIMITED
ANKARA GAZ SATIS A.S.
ARABIAN CHEMICAL TERMINALS
ARABIAN INTERNATIONAL MARITIME COMPANY
ARABIAN INTERNATIONAL MARITIME COMPANY LIMITED
ARABIAN TRADING CO. S.A.
ARAL AKTIENGESELLSCHAFT
ATAS ANADOLU TASFIYEHANESI A.S.
ATLAS SAHARA S.A.
AUSTRALIAN SYNTHETIC RUBBER CO LIMITED
AUTOBAHN-BETRIEBE GESELLSCHAFT MBH
AVIATION FUEL SERVICES LIMITED
AYGAZ A.S.
BALGEE OIL PTY. LIMITED
BANGKOK AVIATION FUEL SERVICES LIMITED
BARRORAFT PTY. LTD
BAYERISCHE ERDGASLEITUNG GMBH
BAYERISCHE MINERAL-INDUSTRIE A.G.
BEER GMBH
BEER GMBH & CO. MINERALOEL-VERTRIEBS-KG

BIN SULAIMAN MOBIL TOWERS
BRICKWOOD HOLDINGS PTY. LTD
BUCK MINERALOELHANDEL KG
CANADIAN SUPERIOR OIL (AUST.) PTY. LTD.
CANNER'S STEAM COMPANY, INC.
CANYON REEF CARRIERS, INC.
CAS (COMBINED AUTOMATION SYSTEM) B.V.
CELMISIA SHIPPING CORPORATION
CENTRAL AFRICAN PETROLEUM REFINERIES (PRIVATE) LIMITED
CERCERA S.A.
CHANGI AIRPORT FUEL HYDRANT INSTALLATION PTE. LTD.
CHUBU TORESEN K.K.
COLLINS PIPELINE COMPANY
COLOMBIANOS DISTRIBUIDORES DE COMBUSTIBLES, S.A. "CODI"
COLONIAL PIPELINE COMPANY
COMET BRENNSTOFFDIENST GMBH
COMMERCIAL POLYMERS PTY. LIMITED
COMMODORE MARITIME COMPANY S.A.
COMPAGNIE AFRICAINE DE TRANSPORT CAMEROUN (CAT.CN)
COMPAGNIE D'ENTREPOSAGE COMMUNAUTAIRE
COMPAGNIE DES PETROLES PRIMAGAZ
COMPAGNIE SENEGALAISE DES LUBRIFIANTS
COMPANIA DE LUBRICANTES DE CHILE LIMITADA (COPEC MOBIL LTDA.)
CONSORTIUM RAYMOND DUEZ
COOK INLET PIPE LINE COMPANY
COREDIS
CORYTON COGEN LIMITED
CYPRUS PETROLEUM REFINERY LIMITED
DEPOT PETROLIER DE MOUREPIANE
DEPOT PETROLIER DU GRESIVAUDAN
DEPOTS DE PETROLE COTIERS
DEPOTS PETROLIERS DE LA CORSE (DPLC)
DEUTSCHE PENTOSIN-WERKE GMBH
DEUTSCHE TRANSALPINE OELLEITUNG GMBH
DIXIE PIPELINE COMPANY

DUKHAN SERVICES COMPANY W.L.L.
DUPONT & DEWULF N.V.
EAST TEXAS SALT WATER DISPOSAL COMPANY
ENTREPOT PETROLIER DE MULHOUSE
ENTREPOT PETROLIER DE NANCY
ENTREPRISE JEAN LEFEBVRE
ERDGAS-VERKAUFS-GESELLSCHAFT MBH
ERDOEL-RAFFINERIE NEUSTADT GMBH & CO. OHG
ERDOL-LAGERGESELLSCHAFT MBH
ESTACIONES DE SERVICIO ML, S.A.
ETABLISSEMENTS BOUTHENET
ETABLISSEMENTS JOSEPH WALLACH
ETABLISSEMENTS ROHRMANN DUFOSSE
FAIRWIND MARITIME COMPANY S.A.
FAVANG AUTOVERKSTED A/S
FELIX OIL COMPANY
FIBIL S.A.
FILTROS DE COSTA RICA, S.A.
FRUEHMESSER GMBH
FRUEHMESSER MINERALOLHANDELS GMBH & CO. KG
FUSO OPERATIONS KABUSHIKI KAISHA
GATWICK REFUELLING SERVICES LIMITED
GAZAL-GAZ ALETLERI A.S.
GEOMINES-CAEN
GEOVEXIN
GHANA BUNKERING SERVICES LIMITED
HANIEL HANDEL GMBH
HEIZOL-HANDELSGESELLSCHAFT MBH
HELLAS GAS STORAGE CO. S.A.
HIBERNIA MANAGEMENT AND DEVELOPMENT COMPANY LIMITED
HYDRANTEN-BETRIEBS-GESELLSCHAFT FLUGHAFEN/FRANKFURT
INDUSTRIA INTERAMERICANA DE FILTROS LTDA. "INTERFIL"
INTOPLANE SERVICES COMPANY LIMITED
IRANIAN OIL PARTICIPANTS LTD.
IRANIAN OIL SERVICES (HOLDINGS) LTD.
IRANIAN OIL SERVICES LIMITED
IRAQ PETROLEUM COMPANY LIMITED

IRAQ PETROLEUM PENSIONS LIMITED
ITALOIL S.R.L.
JAPAN AIRPORT FUELING SERVICE COMPANY, LTD.
JECOP
K.K. SANKYO PLASTICS
K.K. TORESEN
KANSAI PETRO-TERMINAL CO., LTD.
KANTO KYGNUS SEKIYU HAMBAI K.K.
KARL STORZ GMBH & CO. KG
KAWASAKI KYGNUS SEKIYU HAMBAI K.K.
KEIYO SEA-BERTH COMPANY, LTD.
KLAUS KOEHN GMBH
KLAUS KOEHN GMBH & CO. MINERALOEL KG
KURT AMMENN GMBH & CO. KG
KYGNUS EKKA GAS KABUSHIKI KAISHA
KYGNUS KOSAN KABUSHIKI KAISHA
KYGNUS MARKETING SERVICE K.K.
KYGNUS SEKIYU KABUSHIKI KAISHA
KYGNUS SEKIYU SEISEI KABUSHIKI KAISHA
KYOKUTO SEKIYU KOGYO KABUSHIKI KAISHA
LA CENTRAFRICAINE DES PETROLES
LILAC SEKIYU K.K.
LIPET-LIKIT PETROL GAZI VE YAKIT TICARET A.S.
LUBLEND LIMITED
LUBRICANTES DEL SUR, S.A.
MARCEAUX & CIE
MATCO TANKERS (U.K.) LIMITED
MEENTZEN & FRANKE GMBH & CO.
MERTL GMBH
MID STATE PETROLEUM PTY. LIMITED
MINERALOEL-HANDELS-GESELLSCHAFT MBH
MINERALOELWERK WEDEL GMBH & CO. OHG
MOBIL CATALYSTS CORPORATION OF JAPAN
MOBIL KOREA LUBE OIL, INC.
MOBIL MARKETING BARBADOS COMPANY LIMITED
MOBIL MOTOR REST S.A.
MOBIL OIL - AFOR KERESKEDELMI KFT.
MOBIL OIL BARBADOS LIMITED
MOBIL OIL DE MEXICO, S.A. DE C.V.
MOBIL OIL DJIBOUTI

MOBIL OIL FRANCAISE
MOBIL OIL GABON
MOBIL OIL GHANA LIMITED
MOBIL OIL MAROC
MOBIL OIL NIGERIA PUBLIC LIMITED COMPANY
MOBIL OIL PORTUGUESA S.A.
MOBIL PRODUCING CAMEROON INC.
MOBILGAZ MOBIL PETROL GAZLARI A.S.
MOGESTE-GESTAO DE POSTOS DE ABASTECIMENTO LDA.
MOTEL REST S.A.
MT. MARROW BLUE METAL QUARRIES PTY. LIMITED
MULTI TANK CARD B.V.
N.V. ROTTERDAM-RIJN PIJPLEIDING MAATSCHAPPIJ
N.V. SOCONY-STANDARD-VACUUM OIL COMPANY (PETROLEUM MAATSCHAPPIJ)
NAKAJIMA KOSAN KABUSHIKI KAISHA
NEAR EAST DEVELOPMENT CORPORATION
NEW ZEALAND SYNTHETIC FUELS (HOUSING) CORPORATION LIMITED
NEW ZEALAND SYNTHETIC FUELS CORPORATION LIMITED
NICHIMO OIL (BERMUDA) CO., LTD.
NIPPON UNICAR COMPANY, LIMITED
NORDDEUTSCHE ERDGAS-AUFBEREITUNGS-GESELLSCHAFT MBH
NORVAC PTY. LIMITED
OCTAGON PTY. LTD.
OLDENBURGISCHE ERDOEL GESELLSCHAFT MBH
OLJEFORSYNING OFAS A.S.
OSAKA KYGNUS K.K.
OVENS & MURRAY PETROLEUM PTY. LTD.
P.T. ARUN NATURAL GAS LIQUEFACTION COMPANY
P.T. STANVAC INDONESIA
PALOMA PIPE LINE COMPANY
PARS INVESTMENT CORPORATION (PRIVATE COMPANY)
PAUL HARLING MINERALOEL GMBH & CO. KG
PEACE PIPE LINE LTD.
PERKAL PTY. LIMITED
PETROCAB

PETROCAM PTY. LIMITED
PETROGAS PROCESSING LTD.
PETROLEUM SERVICES (MIDDLE EAST) LIMITED
PETROMIN LUBRICATING OIL COMPANY
PETROMIN LUBRICATING OIL REFINING COMPANY
PETROMIN-MOBIL YANBU REFINERY COMPANY LTD.
PIONEER KOSAN K.K.
PLEGADIZOS PARA LA INDUSTRIA S.A.
PRESNALL PTY. LIMITED
PROGAS LIMITED
PROVIDANGE
P6-GROEP B.V.
R. SHERWOOD LIMITED
RACOON S.R.L.
RAINBOW PIPE LINE COMPANY LTD.
RED SEA PLASTIC FACTORY COMPANY LIMITED
REGULUS HOLDING (SINGAPORE) PTE. LTD.
RHODES PETROLEUM INSTALLATION S.A.
ROHOL-AUFSUCHUNGS GESELLSCHAFT MBH
RUHRGAS AKTIENGESELLSCHAFT
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

PORTER H. MITCHELL,
Petitioner,

v.

MOBIL OIL CORPORATION, et al.,
a New York Corporation,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITIONER'S REPLY BRIEF

THOMAS L. ROBERTS
(Counsel of Record)
RODNEY R. PATULA
PRYOR, CARNEY & JOHNSON
A Professional Corporation
6200 S. Syracuse Way, #400
Englewood, CO 80111
Telephone (303) 771-6200
Facsimile (303) 779-0740
Counsel for Petitioner
Porter H. Mitchell

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PETITIONER'S REPLY BRIEF

Mobil's Brief in Opposition offers further good reason for granting the writ in this case. If the *Cone-Globe-Johnson* line of authority is still controlling precedent, then the court of appeal's decision directly conflicts with that authority and allows the law of the case doctrine to work a manifest injustice. On the other hand, if *Neely* overruled the *Cone-Globe-Johnson* line, this Court should seize this opportunity to confirm this important principle and remove the restriction on appellate power which every circuit in the federal system has unnecessarily imposed over the last 24 years since *Neely* was decided.

Mobil ignores the issue of federal appellate power presented and diverts attention from it by arguing that the *Mitchell I* panel directed the district court to enter judgment of dismissal for Mobil, despite its failure to file a motion for judgment n.o.v. Only by miscasting the record

in this regard can Mobil fashion its arguments of waiver and preclusion by law of the case. Further, a waiver argument cannot withstand scrutiny in light of the problem presented: a jurisdictional question of raw appellate power. Finally, the law of the case was never intended to allow a court of appeals to act in conflict with binding authority of this Court.

STATEMENT OF THE CASE

Mobil's "counterstatement" of the case suggests that the first Tenth Circuit panel ordered the trial court to enter judgment for Mobil on remand prior to the filing of the first certiorari petition in this case. That simply never happened. The first time the court of appeals ruled that its opinion and judgment called for outright dismissal of Mitchell's ADEA claims with prejudice was the September 1991 opinion by the second panel, *Mitchell II* (*Petition*, A-1 to A-4).

The *Mitchell I* opinion, 896 F.2d 463, did not direct what relief the trial court was to afford. *Opp. Brief*, SA-17. The judgment merely remanded for "further proceedings" and did not instruct the trial court further. *Petition*, A-7 & A-8. The fact that the first panel found that the trial court's refusal to direct a verdict was error was not equivalent to a direction that judgment enter in favor of Mobil. Direction of a verdict is not tantamount to entry of a judgment. Indeed, that principle is at the heart of the issue presented here. Had the trial court directed a verdict, Mitchell could have requested (before entry of judgment) and the trial court had the discretion to award a nonsuit or new trial in the interests of justice, precisely the important procedural right which a Rule 50(b) motion is designed to protect. Both lower courts have failed to appreciate this crucial procedural right that Mitchell was deprived of when Mobil elected not to file a motion for judgment n.o.v.

Further, "Mitchell's Motion for Clarification of the February 16, 1990 Opinion and Judgment, and Alterna-

tively, Motion to Amend Judgment and Mandate to Expressly Order a New Trial" requested the following relief:

> WHEREFORE, plaintiff-appellee Porter H. Mitchell respectfully requests this Honorable Court *to clarify its prior opinion and judgment* to the effect that remand is with directions *to order a new trial* on Mitchell's ADEA claim *or, in the alternative*, if that was not the intention of this Court, *to modify and amend the opinion and judgment* (and later, fashion the mandate accordingly) *to expressly direct the District Court to order retrial of Mitchell's ADEA claim on remand* if he is unsuccessful in achieving reinstatement of his judgment via a certiorari proceeding with the United States Supreme Court and to afford Mitchell such other and further relief as the Court deems appropriate under the circumstances.

Petition, A-12 & A-13 (emphasis added). Mitchell requested the court to clarify its prior opinion and judgment to state that remand was with directions to order a new trial, or alternatively, to amend the opinion and judgment to expressly direct the trial court to order a retrial. The Tenth Circuit did neither. It simply disposed of the motion in one word: "denied." *Petition*, A-14.

In denying this motion without explanation, the Tenth Circuit did not foreclose the trial court from ordering a retrial but simply refused to clarify its nonspecific remand.[1] In the application for extension of time to file the first petition for certiorari, Mitchell stated that he would include the new trial issue in that petition *only* "[i]f the Tenth Circuit determines that Petitioner is not entitled

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[1] Indeed, the first panel may have felt that clarification was not necessary because it could be assumed that the trial court would, in accordance with the *Cone-Globe-Johnson* rule, order a retrial due to Mobil's decision not to file a Rule 50(b) motion before the *Mitchell I* appeal. Further, one can reasonably infer from the court's refusal to grant the alternative relief that the panel *did intend a retrial* on remand because the alternative relief was necessary *only* if the court did not intend a retrial.

to a new trial on his ADEA claim . . . ." *Opp. Brief*, SA-20. This it simply did not do.

The fact that the Tenth Circuit declined to make that determination rendered the issue unripe for inclusion in the first petition for certiorari—a circumstance brought to this Court's attention on page 1 (footnote 1) of the Petition and reiterated in the Reply Brief. Simply, Mitchell had not yet been denied a retrial.

Whether Mobil was entitled to judgment or merely retrial on remand was never determined by the court of appeals until its September 18, 1991 opinion of which review is now sought. Mobil's suggestion to the contrary is plainly wrong and its insinuation that Mitchell somehow misled this Court on the point regrettable.

A. The Issue In Question Was Unripe Until *Mitchell II* Was Decided In September 1991.

Mobil's waiver arguments are unavailing for several reasons and themselves give reason for certiorari review.

First and foremost, insofar as the concept of waiver is an issue in this case, it involves what rights *Mobil* waived in choosing to take its appeal in *Mitchell I* without first filing a motion for judgment n.o.v. in the trial court. This case is *not* about waiver of rights by Mitchell. Rather, the issue is whether Mobil waived and irretrievably lost the right to relief other than a retrial when it chose not to file a Rule 50(b) motion and instead chose to take an immediate appeal. When Mobil elected that strategy, it foreclosed itself from the possibility of receiving a judgment in its favor based upon insufficiency of the evidence according to clear precedent of this Court, and this is so regardless of whether that issue is determined under *Cone-Globe-Johnson* or under *Neely*.

As one of Mobil's counsel of record in this case has recognized in his treatise on appellate practice, the failure to file a Rule 50(b) motion deprives the appellate court

from entering any relief other than a retrial upon a finding of insufficiency of the evidence:

> In *Cone v. West Va. Pulp & Paper Co.*, 330 U.S. 212 (1947); again in *Globe Liquor Co. v. San Roman*, 332 U.S. 571 (1948); and also in *Johnson v. New York, N.H. & H.R. Co.*, 344 U.S. 48 (1952), the Court held that when a civil verdict loser fails to renew its motion for directed verdict by a timely motion for judgment notwithstanding the verdict, the court of appeals is *powerless* to order entry of judgment for the verdict loser. If the court is convinced the jury verdict is based on insufficient evidence, its sole remedy in such a case is to remand for a new trial.

Michael E. Tigar, *Federal Appeals Jurisdiction and Practice* (1991 Cum. Supp.) § 9.11 at 98 (Shepard/McGraw Hill) (emphasis added). It was Mobil's failure to file a Rule 50(b) motion that deprived the court of appeals of the power to order judgment of dismissal. Nothing Mitchell did or did not do could fill that void or alter the result of Mobil's choice. To hold otherwise, as this Court has recognized on several occasions, would deprive Mitchell of the important procedural right to move for nonsuit or a new trial if the court granted j.n.o.v. *See* Fed. R. Civ. P. 50(c). Mobil filed no such motion. Mitchell was thus never required to do anything to protect his entitlement to a retrial if judgment was reversed on appeal for insufficiency of the evidence. This is the protection identified and preserved by the *Cone-Globe-Johnson* trilogy.

As also recognized by Mr. Tigar, *Neely* did not change this rationale:

> In *Neely v. Martin K. Eby Construction*, 386 U.S. 317, 328-29 (1967), the Supreme Court said that there is "no ironclad rule" forbidding direction of a judgment for the verdict loser, *provided the other party has a chance to argue that a new trial should be awarded as an alternative.*

Id. (emphasis added). The chance that a new trial could be awarded as an alternative to judgment for the verdict loser was present in *Neely* because a motion for judgment n.o.v. was filed in that case. This Court approved an appellate court's order of judgment in *Neely*, not because it decided that a motion for judgment n.o.v. was no longer a strict precondition to such relief (one was filed in *Neely*), but because the verdict winner did not ask for nonsuit or new trial in response to that motion in the trial or appellate court.

As Mobil's counsel has recognized in a nonadversarial context, judgment for the verdict loser based upon insufficiency of evidence can enter *only* if a motion for judgment n.o.v. was filed, thus affording the verdict winner the right to request nonsuit or new trial as an alternative to judgment n.o.v. There was simply nothing for Mitchell to waive once Mobil elected not to file a motion for judgment n.o.v.

Second, as the language of the opinion and judgment in *Mitchell I* and the subsequent motions by Mitchell and the orders disposing of them clearly reveal, the Tenth Circuit never determined, expressly or by implication, that judgment of dismissal (and not retrial) would be required on remand. That determination was never made until the trial court erroneously construed the *Mitchell I* opinion and mandate to require dismissal, a ruling erroneously repeated by a second panel of the Tenth Circuit in *Mitchell II*. Only then was the issue ripe for presentation to this Court, and unripe issues cannot be subject to waiver.

Third, waiver is the "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Mitchell was attempting to find out what his rights were. How then can it be said that he intentionally relinquished or abandoned a "known" right? Further, "the right of jury trial is fundamental [and] courts indulge every reasonable pre-

sumption against waiver." *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937) (where both parties move for directed verdict, right to jury trial not waived).

In sum, Mobil's "waiver" argument skips the only true waiver in this case—Mobil's waiver of the potential for a defense judgment on remand after reversal of Mitchell's judgment for insufficiency of the evidence when Mobil chose to file no Rule 50(b) motion.

B. The Law Of The Case Doctrine Cannot Be Used As A Shield To Insulate From Review Lower Rulings Which Plainly Conflict With Authority Of This Court.

Mobil's law of the case argument is also based on the unfounded assumption that the Tenth Circuit determined, prior to *Mitchell II*, that Mobil was entitled to judgment on remand despite its failure to move for judgment n.o.v. in the trial court. As discussed in the Petition and earlier in this Reply Brief, the very first time the Tenth Circuit ruled that Mobil was entitled to judgment of dismissal based upon its reversal for insufficient evidence was in the *Mitchell II* decision. No amount of artful juxtaposition of excerpts from the pleadings in this case can alter this plain fact.

Second, the law of the case doctrine cannot and should not be mechanically applied to shield from Supreme Court review judicial action in conflict with authority of this Court, especially when it would lead, as here, to a manifest injustice and a procedurally improper result. The law of the case doctrine, unlike federal rules of procedure, is not a limit on appellate court power. *Christianson v. Colt Industries*, 486 U.S. 800, 817 (1988). Nor can that doctrine ever "bind this Court in reviewing decisions below." *Id.*

Mobil's argument (*Opp. Brief*, 7) that *Fogel v. Chestnutt*, 688 F.2d 100 (2d Cir. 1981), *cert. denied*, 459 U.S. 828 (1982), cannot be read as holding that conflict with

a prior decision of this Court should preclude application of the law of the case doctrine except where an intervening opinion reaches a contrary conclusion is nonsensical. To suggest the law of the case doctrine can insulate disregard of established precedent but will not have preclusive effect when there is an intervening change in precedent has no basis in logic or fairness.

C. Mobil's Arguments That 28 U.S.C. § 2106 Appellate Jurisdiction Cannot Be Limited By The Rules Of Civil Procedure And That *Neely* Overruled *Cone* Support Grant--Not Denial—Of The Writ.

The decision below, in effect, interprets 28 U.S.C. § 2106 as creating unlimited appellate power, unrestricted by the rules of procedure. The rules are somehow negated because § 2106 contains no limitation on an appellate court's power to award relief. Although Mitchell concedes that the source of appellate power in this case derives from Article III of the Constitution and 28 U.S.C. § 1291, the Federal Rules of Civil Procedure operate in several ways as limitations on that power. To suggest otherwise relegates them to the status of window dressing.

As the *Cone* line of cases, including *Neely*, makes clear, appellate courts, on reversal of a judgment based upon insufficient evidence, have no power to order any relief for the verdict loser other than retrial. Just as subject matter jurisdiction cannot exist absent the filing of a complaint with cognizable claims, the power of the appellate court to reverse on insufficient evidence and give judgment to a verdict loser cannot exist unless that party first files a Rule 50(b) motion. To the extent, as Mobil argues, that the court below ruled that its § 2106 power is unrestricted by the rules of procedure, such ruling cries out for examination by this Court.

Throughout its Opposition Brief, Mobil omits mention that in *Neely* a motion for judgment n.o.v. was, in fact, filed. That crucial procedural fact explains why this

Court, consistent with *Cone-Globe-Johnson*, could state in *Neely* that the "grant of appellate jurisdiction to the courts of appeal is certainly broad enough to include the power to direct entry of judgment n.o.v. on appeal," (quoted in *Opp. Brief* at 9), and that a new trial request was waived because it was "not raised in the court of appeals or in the petition for writ of certiorari," (quoted in *Opp. Brief* at 12), *Neely*, 386 U.S. at 322 and 329-30. Lifting those quotations out of context of the fact that the verdict loser *did file* a Rule 50(b) motion in *Neely* seriously distorts its holding, a distortion the Tenth Circuit adopted in this case. On the other hand, if *Neely* did overrule *Cone* and its progency, then this Court should so declare. In either instance, the issue is worthy of this Court's consideration.

CONCLUSION

For the important reasons described in the Petition and in this Reply Brief, petitioner respectfully requests this Court to grant a writ of certiorari to the Tenth Circuit Court of Appeals and schedule this matter for full briefing and argument to explicate and stabilize the *Cone* line of authority and the relationship of the Federal Rules of Civil Procedure to 28 U.S.C. § 2106, or alternatively, due to the clear conflict of the decision below with past decisions of this Court, the Court should confirm the vitality of the *Cone* rule by summary reversal and remand of this case for retrial.

Respectfully submitted,

THOMAS L. ROBERTS
(Counsel of Record)
RODNEY R. PATULA
PRYOR, CARNEY & JOHNSON
A Professional Corporation
6200 S. Syracuse Way, #400
Englewood, CO 80111
Telephone (303) 771-6200
Facsimile (303) 779-0740
Counsel for Petitioner
Porter H. Mitchell

DATED this 2nd day of March 1992.